TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 548

NICK ALFORD AGUILAR, PETITIONER

vs.

TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1963
CERTIORARI GRANTED OCTOBER 14, 1963

Supreme Court of the United States

OCTOBER TERM, 1963

No. 548

NICK ALFORD AGUILAR, PETITIONER

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TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

INDEX

[fol. A]

IN THE CRIMINAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

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PRESENTATION OF INDICTMENT—Jan. 27, 1960

On this the 27th day of January, A. D. 1960, the Grand Jury came into the Criminal District Court No. 5 of Harris County, Texas, a quorum thereof being present and through their Foreman presented to the Judge thereof the following Bills of Indictment which were in accordance with law filed and docketed in this Court, and all necessary process to issue thereon, to-wit:

THE STATE OF TEXAS VS. NO.: 90264 NICK ALFORD AGUILLAR

• • • •

[fol. B]

IN THE CRIMINAL COURT OF HARRIS COUNTY

INDICTMENT—Jan. 27, 1960

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS

The Grand Jury of Harris County, State of Texas, duly organized at the NOVEMBER TERM, A. D. 1959, of Criminal District Court No. 5 of said county, in said Court, at said term, do present that

NICK ALFORD AGUILLAR

on or about the 8th day of January, A. D. 1960, in said County and State, did then and there unlawfully possess a narcotic drug, to-wit: heroin. Against the peace and dignity of the State.

/s/ E. C. Scurlock
Foreman of the Grand Jury

• • • •

[fol. C]

IN THE CRIMINAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

* * * *

Cause No. 90264

THE STATE OF TEXAS
vs.
NICK ALFORD AGUILAR

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

The defendant stands charged by Indictment with the unlawful possession of a narcotic drug, to-wit: heroin, in the County of Harris and State of Texas, on or about the 8th day of January A. D. 1960.

To this charge the defendant has pleaded "not guilty".

You are charged that it is unlawful for any person in this State to possess, or have under his or her control, deal in, or sell heroin, and upon conviction therefor shall be guilty of a felony and the punishment assessed at a term in the State Penitentiary of not less than two years nor more than life.

Now, therefore, in this case, if you believe from the evidence beyond a reasonable doubt, that on or about the 8th day of January A. D. 1960, in the County of Harris and State of Texas, as charged in the Indictment, the defendant, Nick Alford Aguilar, did then and there unlawfully possess a narcotic drug, to-wit: heroin, you will find him guilty as charged in the Indictment, of the unlawful possession of a narcotic drug, to-wit: heroin, and assess his punishment at confinement in the State Penitentiary for a term of not less than two years nor more than life.

If you do not so believe, or if you have a reasonable doubt thereof, you will find the defendant "not guilty".

You are further instructed that by the term "possession", as used in this charge, is meant the actual personal

control, care and management of the heroin alleged to have been possessed.

Therefore, unless you believe from the evidence beyond a reasonable doubt that the defendant on or about the time alleged in the Indictment, in Harris County, Texas, did have in his possession heroin, as that term has hereinbefore been defined to you, you will acquit the defendant, and say by your verdict "not guilty".

[fol. D] A defendant in a criminal case is not bound by law to testify in his own behalf therein but the failure of any defendant to so testify shall not be taken as a circumstance against him nor shall the same be alluded to nor commented upon by the jury, and you must not refer to, mention, comment upon or discuss the failure of the defendant to testify in this case, and any juror doing so may be guilty of contempt of court. If any juror starts to mention the defendant's failure to testify in this case then it is the duty of the other jurors to stop him at once.

[fol. E] If you find the defendant guilty then you must not arrive at the punishment to be assessed by any lot or chance or by putting down any figures and doing any dividing.

In deliberating upon this case you must not refer to or discuss any matters not in evidence before you.

* * * *

[fol. F] In all criminal cases the burden of proof is on the State.

The defendant is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable doubt; and in case you have a reasonable doubt as to the defendant's guilt you will acquit him, and say by your verdict "not guilty."

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the court, which is herein given you, and be governed thereby.

/s/ E. B. Duggan
Judge, Criminal District Court
Harris County, Texas.

[fol. G]

IN THE CRIMINAL COURT OF HARRIS COUNTY

VERDICT

We, the Jury, find the Defendant guilty as charged and assess his punishment at confinement in the State Penitentiary for twenty (20) years.

/s/ William T. Higdon
Foreman of the Jury

* * * *

[fol. H]

IN THE CRIMINAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

[Title Omitted]

VERDICT AND JUDGMENT

THIS DAY this cause was called for trial, and the State appeared by her District Attorney, and the Defendant, NICK ALFORD AGUILLAR appeared in person and by Counsel, C. Woody, and both parties announced ready for trial; and the said Defendant, NICK ALFORD AGUILLAR, in open Court pleaded not guilty to the charge contained in the indictment herein; thereupon a Jury to-wit: W. T. Higdon and eleven others, was duly selected, empanelled and sworn, according to law, who having heard the indictment read, and Defendant's plea of not guilty thereto; and having heard the evidence submitted and having been duly charged by the Court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open Court this day the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit:

"We, the Jury, find the Defendant guilty as charged and assess his puishment at confinement in the State Penitentiary for twenty (20) years.

WILLIAM T. HIGDON
Foreman of the Jury"

It is, therefore, considered and adjudged by the Court that the Defendant, NICK ALFORD AGUILLAR is [fol. I] guilty of the offense of Unlawful Possession of a narcotic drug, to-wit: Heroin, a felony, as found by the jury, and that he be punished, as has been determined by confinement in the State Penitentiary for 20 years, and that the State of Texas do have and recover of the said Defendant all costs in the prosecution expended, for which execution will issue, and that the said Defendant be remanded to jail to await the further orders of this Court herein.

* * * *

[fol. J]

IN THE CRIMINAL COURT OF HARRIS COUNTY

[Title Omitted]

DEFENDANT'S REQUEST THAT SENTENCE BE POSTPONED AND ORDER OF THE COURT THEREON—Jan. 19, 1962

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW NICK ALFORD AGUILAR, Defendant in the above entitled and numbered cause and files this his Motion in opposition to the Court assessing sentence on him in this cause on this date and would respectfully show unto the Court as follows:

That heretofore this Defendant was found guilty by a jury in this cause and his punishment was fixed by the jury at twenty years imprisonment. The evidence intro-

duced in this cause against this Defendant was secured by a joint venture of the Federal narcotic officers together with the State narcotic officers utilizing a search warrant obtained by the State officers. That the Defendant in this cause has been indicted and is now engaged in the trial for the same transaction of which he has been found guilty in the cause before this Court.

This Defendant was indicted in Criminal No. 14326 in the United States District Court for the Southern District of Texas, Houston Division, entitled "United States of America v. Nicholas Alfred Aguilar" for a violation of the Harrison Act and more particularly it alleges that the Defendant violated Title 21, Section 174, U.S.C.A. and Title 26 § 4705a, U.S.C.A. and in Paragraph 8 of said indictment it alleges that on the 8th day of January, 1960, the defendant illegally possessed and concealed six grams of heroin that is the basis of the prosecution in Cause No. 90264 in this Honorable Court. The present prosecution of this cause is therefore barred and should be here and now terminated due to the fact that the Federal authorities are prosecuting this Defendant for the same offense as alleged in the instant indictment and [fol. K] Article 725b, V.A.P.C. provides that no person shall be prosecuted under the provisions of Article 725b where he has been held to answer for the same act of omission under the Federal Narcotic Act. Further that a Motion to Suppress evidence is now before the Hon. Allen B. Hannay for the same reasons that were advanced during the trial of this cause and if the Motion to Suppress is granted and this search warrant held void, then this Court would have no alternative other than to grant the Defendant a new trial and if the Court has imposed sentence and the Defendant has appealed therefrom, the Court will be without jurisdiction and the Defendant will be denied his Constitutional rights.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays this Honorable Court to postpone sentencing the Defendant in this cause until a final determina-

tion has been made in the case now pending in the Federal Court concerning the same transaction.

/s/ Clyde W. Woody
CLYDE W. WOODY
Attorney for Defendant
1114 Texas Avenue Bldg.
Houston 2, Texas
CA-2-9225

19 January 1962
Motion overruled to which df. excepts.

/s/ E. B. Duggan
Judge Presiding

* * * *

[fol. L]

IN THE CRIMINAL COURT OF HARRIS COUNTY

[Title Omitted]

JUDGMENT, SENTENCE AND NOTICE OF APPEAL—
Jan. 19, 1962

THIS DAY this cause being again called; the State appeared by the District Attorney and the Defendant's Counsel, C. Woody, also being present, the Defendant, NICK ALFORD AGUILLAR, was brought into open Court in person, in charge of the Sheriff for the purpose of having sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on a former day of a former term of a former year.

And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant to pronounce sentence against him as follows, to-wit:

"It is the order of the Court that the Defendant, NICK ALFORD AGUILLAR, who has been adjudged to be guilty of Unlawful possession of a narcotic drug, to-wit: Heroin, a felony, whose punishment has been assessed by the verdict of the Jury at confinement in the State Penitentiary for 20 years, to be delivered by the Sheriff of Harris County Texas, immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Penitentiary for not less than 2 years nor more than 20 years in accordance with the provisions of the law governing the Texas Department of Corrections."

And the said Defendant is remanded to jail until said [fol. M] Sheriff can obey the directions of this sentence.

To which action of the Court the defendant excepts in open Court and gives notice of appeal to the Court of Criminal Appeals in Austin, Texas, and inasmuch as notice of appeal is herein given, execution of this sentence is deferred to await the judgment of our Court of Criminal Appeals in this behalf.

* * * *

[fol. N]

IN THE CRIMINAL COURT OF HARRIS COUNTY

[Title Omitted]

MOTION TO INCLUDE WITNESSES' STATEMENTS IN THE STATEMENT OF FACTS AND TRANSCRIPT AND ORDER THEREON

Comes now the Assistant District Attorney for the State of Texas and would show the Court as follows:

I was the prosecutor who prosecuted the above numbered and entitled cause which was tried on the 6th day of September, A.D. 1961, in the Criminal District Court of Harris County, Texas. During the course of the trial, while the witnesses, J. J. Strickland, and B. J. Rogers, were testifying, they testified that they had made an offense report concerning the occurrence of the offense for

which the defendant in this case was being tried. Counsel for the defense asked the Court to instruct counsel for the State to allow him to examine and have a copy of the written offense report made by the officers. The State's objection was sustained, to which the defendant excepted. However, the attorney for the defendant did not ask for the offense report to perfect his Informal Bills of Exception No. 4 and No. 6 (S.F. pp. 31-33 and pp. 43-45).

After the date of the trial of this case, on December 13, 1961, the Honorable Court of Criminal Appeals in the case of *Gaskin* v. *State*, No. 33909, has held that the defendant in such a case is entitled to the offense report. The cases of *Pruitt* v. *State*, No. 34,207, in the Court of Criminal Appeals, and *Martinez* v. *State*, No. 34,279, in the Court of Criminal Appeals, have likewise held the defendant is entitled to statements of witnesses or the offense report for the purposes of cross-examination of a witness.

Attached hereto as State's Exhibit "A" is the offense [fol. O] report made by Officers Strickland and Rogers, and this is the only offense report so made by the said officers and in the possession of the prosecution.

In view of the holding of the Honorable Court of Criminal Appeals in the above mentioned cases, the State moves this Honorable Court to enter an order that the clerk shall include in the transcript of this cause and forward to the Court of Criminal Appeals a photostatic copy of the said offense report made by the said officers in order that the Court of Criminal Appeals may have before them the offense report made by the officers, and in order that they may ascertain whether or not the Appellant was injured by the refusal of the State to deliver to the Appellant's attorney a copy of the said offense report.

/s/ Gus J. Zgourides
GUS J. ZGOURIDES
Assistant District Attorney
Harris County, Texas

COURT'S ORDER

The Court having considered the foregoing motion and being fully advised in the premises, it is ordered that the foregoing motion be and it hereby is granted and that the said motion, this order, and Exhibit "A", the offense report of Officers Strickland and Rogers, be filed and placed in the transcript and forwarded to the Court of Criminal Appeals.

/s/ E. B. Duggan
EDMUND B. DUGGAN, Judge
Criminal District Court
Harris County, Texas

[fol. P]

APPENDIX "A"

OFFENSE REPORT

HOUSTON POLICE DEPARTMENT
Possession of Heroin
State of Texas

Offense Possession of Heroin
Complainant State of Texas
Reported by Officers
Where committed 509 Pinckney
Date and time of occurrence 1-8-60 5:20PM
Received by Officers
Hensley-Records

* * * *

Date-Time 1-8-60 5:20PM
1-8-60 7:20PM
How On view person

Details of Offense—Suspects—Persons Arrested—Property

At approx. 4:00PM this date, 1-8-60, officers rec'd reliable information from a credible person who did believe that one Nick Alfred Aguillar (LAM) (31) who lives at

509 Pinckney had one, or about, his person a quantity of Heroin. Officers B. J. Rogers and J. J. Strickland, went to Judge Ragan's Office and rec'd Narcotic search warrant for the above location.

Officers went to the above location, and executed the search warrant. As Officers J. J. Strickland and B. J. Rogers entered through the front door, followed by Officers R. G. Gartman and A. J. Geffert we chased Nick Aguillar through the house, to the bath room, which is located in the extreme rear of the house and the subj. threw a small celophane package into the commode and flushed the commode at the same time. Officers Strickland stuck his hand in the commode and fished out the small package, witnessed by Officers Rogers, and Chavez who had entered through the back door along with M. E. Gentry and W. A. Purdue and Jack Kelley and John Ripa.

Officer Strickland opened the small celophane package and found that it contained six papers of Heroin which were individually wrapped in blue celophane paper. The Narcotics was given a reagent test in station 781 and the results were positive. The Narcotics were then initialed dated, sealed in an envelope which was initialed by all officers and dropped in the chemists locked box for his analysis, by Officer Strickland at 7:15PM this date, 1-8-60, witnessed by B. J. Rogers and M. Chavez.

The subj. was brought to station 351 where a hold was obtained for Narcotics and charges of Possession of Heroin were filed on this subj. in Judge Ragan's Court this date.

* * * *

[fol. Q] ARRESTED: Nick Alfred Aguillar (LAM) (31) 509 Pinckney

Officers B. J. Rogers - J. J. Strickland, R. G. Gartman, M. Chavez, A. J. Geffert, M. E. Gentry, W. A. Purdue, Jack Kelley.

* * * *

[fol. R] * * *

[fol. S]

IN THE CRIMINAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

• • • •

CERTIFICATE OF THE CLERK AND DEFENDANT IN CUSTODY

I, R. J. LINDLEY, District Clerk of Harris County, Texas, do hereby certify that the above and foregoing -18- pages in writing, contain a complete, full and correct transcript of the proceedings had at the August Term, A. D. 1961, of said Court, as shown by the papers on file and the records of my office, wherein THE STATE OF TEXAS was the Plaintiff, and NICK ALFRED AGUILLAR was the Defendant.

AND I DO HEREBY FURTHER CERTIFY THAT tht Defendant, NICK ALFORD AGUILLAR is in the custody of the Sheriff of Harris County, Texas; he having filed no Appeal Bond and made no Recognizance.

WITNESS MY HAND AND SEAL OF SAID COURT at Houston, Texas, this 23rd day of APRIL A. D. 1962.

R. J. LINDLEY,
District Clerk
Harris County, Texas
By: /s/ W. R. Hardy
Deputy

[fol. 1]

IN THE CRIMINAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

August Term, A. D. 1961

Cause No. 90264

THE STATE OF TEXAS

vs.

NICK ALFORD AGUILLAR

* * * *

TRANSCRIPT OF TESTIMONY

BE IT REMEMBERED, that upon this the 6th day of September, A.D. 1961, the above-numbered and entitled Cause coming on for trial upon the regular call of the docket before THE HON. EDMUND B. DUGGAN, JUDGE OF SAID COURT, and all parties having appeared in person and by their respective counsel, and having announced ready for trial, the following evidence was adduced and facts proven, to-wit:

APPEARANCES

FOR THE STATE:

Mr. Gus J. Zgourides
and
Mr. James I. Smith, Jr.
Assistant District Attorneys

FOR THE DEFENDANT:

Mr. Clyde W. Woody
114 Texas Avenue Bldg.
Houston, Texas

* * * *

[fol. 2]

THE DEFENDANT INVOKED THE RULE

* * * *

J. J. STRICKLAND,

called as a witness on behalf of the STATE, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. ZGOURIDES:

Q. Will you state your name to the Court and to the jury, please?

A. J. J. Strickland.

Q. And what is your profession or occupation, Mr. Strickland?

A. Police officer.

Q. And to which division are you assigned?

A. The Narcotics Division.

Q. That's with the City of Houston Police Department, is it not?

A. Yes, sir.

Q. How long have you been a City of Houston police officer?

A. Aproximately five years.

Q. And how long have you been assigned to the Narcotics Division of the City of Houston Police Department?

A. Two years.

[fol. 3] Q. And were you so assigned, then, back on the 8th day of January, 1960?

A. Yes, sir, I was.

Q. And on the 8th day of January, 1960, did you have an occasion to be in the vicinity of 509 Pinkney?

A. Yes, sir, I did.

Q. Is 509 Pinkney Street here in Houston, Harris County, Texas?

A. Yes, sir, it is.

Q. And when you had that occasion to be there at or about 509 Pinkney Street, were you alone or were you with someone else?

A. I was with some other officers.

Q. Would you give me their names, please?

A. Officers Rodgers, Gartman, Chavez, Perdue, Geffert, and Federal Agents Kelly and Ripa.

Q. You have testified then that there were Officers Rodgers, Chavez, Geffert, Gartman, yourself, and Federal officers Ripa and Kelly, am I correct in that?

A. Yes, sir.

Q. And are Federal officers Ripa and Kelly, were they also narcotic officers?

A. Yes, sir, they were.

Q. About what time of the day or night was it that you got to the vicinity of 509 Pinkney Street?

[fol. 4] A. About 5:20 o'clock in the evening.

Q. At that time was it still light, or dark, or what was it at that time?

A. It was dusk, that is, still light-dusk.

Q. And when you got to 509 Pinkney Street, what is located there at 509 Pinkney Street?

A. A house.

Q. And by a house, do you mean a residence?

A. Yes, sir, a residence.

Q. And when you got to 509 Pinkney Street, what did you do?

A. Walked up to the front door and knocked on the door.

Q. And who was with you when you went up and knocked on the front door?

A. Officers Rodgers, Gartman and Chavez.

Q. All right, and this was about 5:20 in the afternoon or in the early evening, am I correct in that?

A. Yes, sir.

Q. And what, if anything, happened when you knocked on the front door?

A. A voice from the inside asked who it was, who was there.

Q. And what, if anything, did you reply?

A. We replied that we were police officers and had a search warrant for that location.

Q. All right, and had you, in fact, sworn out a search warrant for that address, 509 Pinkney Street?

[fol. 5] MR. WOODY: I object to this, Your Honor, as being an improper question, and also calling for a conclusion on the part of the witness. This certainly is not a proper—this is a question of law and not a question of fact.

THE COURT: I will sustain your objection at this time, counsel.

MR. ZGOURIDES CONTINUES:

Q. Prior to going to 509 Pinkney Street, had you gone out and sworn out an affidavit for a search warrant?

A. Yes, sir.

Q. And did you go to a Justice of the Peace to do that?

A. Yes, sir.

Q. And about what time of the day was it when you went to swear out a search warrant?

A. About 4:20 or 4:30 o'clock in the afternoon, something like that.

Q. About an hour before going to this particular address?

A. Yes, sir, about an hour before we went to that address.

Q. And before which Justice of the Peace did you go to swear out the affidavit for the search warrant?

A. Judge Ragan.

Q. And did anyone go with you to Judge Ragan's Court to swear out the affidavit for the search warrant?

[fol. 6] A. Officer Rodgers.

Q. And Officer Rodgers is here today, is he not?

A. Yes, sir, he is.

Q. And you did, in fact, swear out an affidavit for a search warrant?

A. Yes, sir, we did.

Q. And did the Justice of the Peace, Judge Ragan, then issue a search warrant for that address?

MR. WOODY: We object to this also, Your Honor, as calling for a conclusion on the part of the witness.

THE COURT: I will sustain it. Let's get along, gentlemen.

MR. ZGOURIDES CONTINUES:

Q. All right, now, when you got to 509 Pinkney Street, were you or were you not then armed with a search warrant at that time?

MR. WOODY: I object to this, Your Honor, the same objection, as it calls for a legal conclusion on the part of a lay witness. This best evidence rule would require—and it is not a proper matter to be brought up before the jury in the first place.

[fol. 7] THE COURT: I will sustain it. Let's get along, gentlemen.

MR. ZGOURIDES CONTINUES:

Q. All right, what happened when you walked up to 509 Pinkney Street?

A. I walked up to the front door and knocked on the front door.

Q. And what, if anything, did you say?

MR. WOODY: I object to this as already repetitious, Your Honor. He has already testified to it.

THE COURT: That is overruled, counsel.

A. A voice from the inside asked who was there, and we replied police officers, and we have a search warrant for that location.

Q. All right, then what did you do at that time?

A. Right after we replied who we were and we had a search warrant, we heard a scuffling inside, as if someone started to run. We then made forced entry onto a screen door which was latched. Officer Rodgers jerked the door open and I went through the wooden door, which was unlocked. The defendant . . .

MR. WOODY: I object to anything that he might [fol. 8] have seen, Your Honor, until he shows himself legally on the premises.

THE COURT: All right, the jury may retire.

THE JURY RETIRED, AND THE FOLLOWING PROCEEDINGS WERE HAD OUT OF THE PRESENCE AND HEARING OF THE JURY.

THE COURT: All right, continue, please.

MR. ZGOURIDES: Am I to proceed at this point, Your Honor, or is the objector to proceed?

THE COURT: Well, if you want to go into the search warrant, don't you think that it is proper now, out of the presence of the jury?

MR. ZGOURIDES: Yes, Your Honor.

MR. ZGOURIDES CONTINUES:

Q. I believe you previously testified, Mr. Strickland, that on that date, the 8th day of January, 1960, you had occasion to go to the Justice of the Peace, to Judge Ragan's court, did you not?

A. Yes, sir.

Q. You, along with Officer B. J. Rodgers, am I correct in that?

A. Yes, sir.

[fol. 9] Q. And, at that time, did you swear out an affidavit for a search warrant?

A. We did.

Q. And did you swear out an affidavit for a search warrant of the premises at 509 Pinkney Street?

MR. WOODY: This is just time-consuming, Your Honor. I object to that. The best evidence rule would require an introduction and the production to the Court of the document to which he refers to.

THE COURT: He may go into it.

MR. WOODY: Note my exception.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 1.

MR. ZGOURIDES CONTINUES:

Q. Did you swear out a search warrant for that address, 509 Pinkney Street, Houston, Harris County, Texas?

A. We, did.

Q. And in that search warrant, did you set out there who you thought resided at those premises?

MR. WOODY: Do my exceptions to the best evidence [fol. 10] rule go to all of this testimony, Your Honor, my exception?

THE COURT: All right, do you have a search warrant available, Mr. Zgourides?

MR. ZGOURIDES: Yes, sir, Your Honor.
THE COURT: All right, let's get it.
MR. ZGOURIDES: Here it is, Your Honor.
THE COURT: All right, let's identify it, pass it to the court reporter.

(It was marked by the Court Reporter as D-1, as shown below, because the State did not want it marked as their exhibit).

MR. ZGOURIDES: CONTINUES:

Q. This is the search warrant that you have reference to, Officer Strickland?
A. Yes, sir, it is.
MR. WOODY: May I see it, Your Honor?
THE COURT: Yes, pass it to Mr. Woody, please.

(The search warrant was passed to Mr. Woody by Mr. Zgourides).

MR. WOODY: May we have this marked as an exhibit in order that we may identify it, Your Honor.
THE COURT: You may.
MR. WOODY: It is a State's Exhibit.
MR. ZGOURIDES: No, the State is not offering it, Your Honor.
[fol. 11] THE COURT: It is not a State's Exhibit, do you wish to offer it, Mr. Woody?
MR. WOODY: We would like to have it marked, Your Honor.
THE COURT: All right, mark it.

(The search warrant was marked D-1, as stated above).

MR. WOODY: Are you through, Mr. Zgourides?
MR. ZGOURIDES: Go ahead, counsel.

QUESTIONS BY MR. WOODY:

Q. I hand you what has been marked D-1, Exhibit D-1, is this the affidavit for the search warrant that you indicated that you appeared before the Justice of the Peace and swore out?

A. Yes, sir.

Q. I notice that you say that you received here—you are one of the affiants—there are two affiants written on here, B. J. Rodgers and J. J. Strickland?

A. Yes, sir.

Q. And you state, among other things, that you have received reliable information from a credible person and do believe that heroin and marijuana and barbiturates and other narcotic paraphernalia are being kept at the above-described premises for the purposes of sale and [fol. 12] use contrary to the provisions of the law, is that correct?

A. Yes, sir, if that is what is exactly stated there, MR. WOODY.

MR. WOODY: Let the record reflect that the witness is examining Exhibit D-1.

Q. Is that what it says on there?

A. Yes, sir.

Q. And when did you receive this reliable information from this credible person?

A. Approximately a week or a little over a week before the search warrant was executed.

Q. Was there anything to preclude you from getting the search warrant prior to that week, the intervening week?

A. Would you repeat your question, Mr. Woody?

Q. Was there any reason why you couldn't have gotten a search warrant within the week preceding the 8th of January?

MR. ZGOURIDES: Your Honor, of course counsel has gone a little astray from any question of law that might appear on the search, and I am objecting on those grounds, Your Honor.

[fol. 13] THE COURT: That is sustained.

MR. WOODY: Note my exception, Your Honor.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 2.

MR. WOODY: I would like to bring the Court's attention to the recent case of Dollary Mapp vs. the State of Ohio, decided upon the 19th of June, 1961. Is the Court familiar with the case?

THE COURT: No, sir, the Court isn't. Do you happen to have a Texas case on it, counsel, a Court of Criminal Appeals case?

MR. WOODY: This case holds, the Supreme Court of the United States holds that a case holds this, that hereafter in all state proceedings that the Fourth Amendment will prevail in the state courts, and that if any evidence is obtained in violation of the Fourth Amendment, then the same will not be admissible in a state case, even in a state proceeding where the federal people had [fol. 14] nothing whatever to do with the arrest, the search, or the prosecution. It is the extreme reversal of the Supreme Court's decision heretofore that the Court is familiar with, I am sure, but in the Mapp case, the Supreme Court of the United States held that henceforth they would be the final arbiters in search and seizures, and that if any evidence is obtained in violation of the Fourth Amendment, or the Fifth Amendment, that they would consider it a violation of the Fourteenth Amendment, the due process of law, the equal protection of the law clause in the Fourteenth Amendment, and henceforth the Supreme Court and not any inferior court in the states would be the final arbiter of what is illegally obtained. This is a far-reaching decision. We have not had an opportunity to get it to the the Court of Criminal Appeals of Texas at this time. Essentially what this case did was to put teeth into the case of Wolfe v. [fol. 15] Colorado, that the Supreme Court decided in 1948. If the Court is interested in it, I have the opinion here. Under the Fourth Amendment of the Constitution of the United States, we have the right to inquire where the affiant received the credible information, if he did receive any, and if he did not immediately get a search warrant, then he has violated the Constitution of the United States and we no longer have to look to the procedure law and the substance of the law of the State of Texas, but we can look directly to the Constitution and to the federal laws under the Mapp v. Ohio decision, which is a very sound decision.

THE COURT: I will read it, counsel, if you wish me to read it.

MR. WOODY: Here it is, Your Honor.

THE COURT: I sustain the State's objection, counsel.

MR. WOODY: Is the Court refusing me the right to go into where the officer obtained, and when, and [fol. 16] under what circumstances the officer obtained the information that he says that he had?

THE COURT: I just sustained their objection, counsel.

MR. WOODY: For the purposes of my bill I would like to have the officer answer my question, if there was any reason why he could not have obtained a search warrant in the week preceding the 8th of January, when he had the information, and when he obtained the search warrant in question.

THE COURT: All right, you may go ahead and proceed, counsel.

MR. WOODY CONTINUES:

Q. Would you state why there was any reason why you could have not gotten the search warrant between the dates of the 1st of January and the 8th of January, 1960, in view of the fact that you had the information for a week?

A. Because we wanted to set up surveillance on the house.

Q. I beg your pardon?

A. Because we wanted to set up surveillance on the house.

[fol. 17] Q. Is that the only reason that kept you from obtaining a search warrant—there was a Justice of the Peace available to issue the search warrant, wasn't there?

A. Yes, sir, there was a Justice of the Peace available.

Q. And this is the same information that you had on the 1st of January?

A. Some of it, yes, sir.

Q. And the information that you have testified hereto, you received on the 1st of January, 1960?

A. Yes, sir, the first information.

Q. All right, and you did not apply for a search war-

rant between the 1st of January and the 8th of January, 1960?

A. No, sir.

Q. You typed this search warrant out, and you also typed out the affidavit before you went over to Judge Ragan's court, isn't that correct?

A. I didn't type it out.

Q. Well, someone in your office did?

A. Someone in the office typed it out, yes, sir.

Q. In other words, they typed up the affidavit and they typed out the search warrant, and you just took them over and had Judge Ragan sign it?

A. After they were typed out we took them over and had them signed by Judge Ragan.

[fol. 18] Q. And this is the only search warrant that you obtained for the residence at 509 Pinkney Street, the residence of the defendant?

A. Yes, sir.

MR. WOODY: We would like to introduce the search warrant only, Your Honor, to support our objection and bill of Exception and not as an exhibit to go to the jury.

THE COURT: All right.

THE ABOVE-MENTIONED SEARCH WARRANT, MARKED DEFENDANT'S EXHIBIT NO. 1, OR D-1, WAS RECEIVED IN EVIDENCE ON THE ABOVE-STATED CONDITIONS, AND COPY OF SAME IS SHOWN ON THE FOLLOWING PAGE NO. 18-A.

[fol. 18-A]

DEFENDANT'S EXHIBIT MARKED D-1

Search Warrant upheld by Judge Hannay

DEFENDANT'S EXHIBIT D-1

File No. 4978

IN JUSTICE'S COURT

Precinct No. 1, of Harris County.

THE STATE OF TEXAS

vs.

NICK ALFRED AGUILAR a Mexican male, 509 Pinckney Street, in the City of Houston, County of Harris and the State of Texas

SEARCH WARRANT

Issued the 8 day of January, A.D. 1960. 4:45 p.m.
W. C. RAGAN, Justice of the Peace,
Precinct No. 1
Harris County, Texas.

Rogers & Strickland
Ret 1/12

AFFIDAVIT FOR SEARCH WARRANT (FOR NARCOTICS) FOR PRIVATE RESIDENCE

Motions To Suppress DEFTS. Exhibit No. 1 C.R. 14, 236 WHE JAN 22, 1962

THE STATE OF TEXAS)
COUNTY OF HARRIS.)

Before me, the undersigned authority, on this day personally appeared the undersigned affiants, who being by me severally sworn, upon their oaths state, that: A certain building, house and place, occupied and used as a private residence, located in Harris County, Texas, described as a one story green frame building, Located at 509 Pinckney Street, in the City of Houston, County of

Harris and in the State of Texas and all out buildings and motor vehicles pertinent to the above described premises.

(Give street name and number, and name of city or town, or accurate description and location of place)

and being the building, house or place of Nick Alfred Aguilar a Mexican male and other person or persons unknown to the affiants by name, identity or description.

(Give full name or describe person accurately or state if unknown)

is a place where we each have reason to believe and do believe that said party so occupying and using, as a private residence, the said building, house and place has in his possession therein narcotic drugs, as that term is defined by law, and contrary to the provisions of law, and for the purpose of the unlawful sale thereof, and where such narcotic drugs are unlawfully sold; that on or about the 8 day of January, A.D. 1960, Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.

(Here state facts and information showing probable cause)

/s/ B. J. Rogers, Affiant.
/s/ J. J. Strickland, Affiant.

Subscribed and sworn to before me, by the within named affiants, on this the 8 day of January, A.D. 1960.

/s/ W. C. Ragan 4:40 p.m.
Justice of the Peace, Precinct No. 1, Harris County, Texas.

THE STATE OF TEXAS) IN THE NAME AND
) BY AUTHORITY OF
COUNTY OF HARRIS,) THE STATE OF TEX-
) AS

To the Sheriff or any Peace Officer of Harris County, GREETING:

Whereas, the above complaint on oath and in writing, in accordance with law, has this day been made before me, alleging that the premises described as in the foregoing affidavit situated in said Harris County, Texas, and being the premises of Nick Alfred Aguilar a Mexican male and other person or persons unknown to the affiants by name, identity or description.

is a place where narcotic drugs, described in the foregoing affidavit, are unlawfully sold, and possessed for the purpose of sale, and whereas, the particular grounds and probable cause for this warrant to issue are set forth in the said affidavit, which is made a part hereof, upon examination of the same by me, I am satisfied that the grounds exist and that probable cause is shown, and I believe in its existence and do so hereby find.

You are therefore hereby commanded to search forthwith the above described premises for any said narcotic drugs, as that term is defined by law, unlawfully possessed, and possessed for the purpose of the unlawful sale thereof, and if any such narcotic drugs be found at any time within three days of the issuance hereof, upon or in said building, house or place so used as a private residence, you are hereby further commanded to seize all such narcotic drugs, and containers thereof; And you are hereby further commanded to arrest the said Nick Alfred Aguilar a mexican male and others unknown to the affiants., the person accused of the unlawful possession, sale and equipment.

Herein fail not, but have you then and there this warrant within three days from its issuance with your return thereon showing how you have executed the same.

WITNESS my hand, this 8 day of January, A.D. 1960.

/s/ W. C. Ragan
Justice of the Peace, Precinct No. 1, Harris County, Texas.

OFFICER'S RETURN

Came to hand the 8 day of January, A.D. 1960, at 4:40 o'clock P.M. and executed the 8 day of January, A.D. 1960, at 5:20 o'clock P.M. by B. J. Rogers, W. A. Perdue, J. J. Strickland, M. Chavez, Jack Kelly, J. Ripa, M. E. Gentry, A. J. Geffert.
Arrested: Nick Alfred Aguilar M.M. 31
Found 6 Grams of Heroin: Will be filed on for possession of Heroin

/s/ B. J. Rogers
/s/ J. J. Strickland

MR. WOODY: And at this time, we would object to any of the fruits of the search because the search warrant, the affidavit for a search warrant, does not comply with the Fourth and Fourteenth and the Fifth Amendments of the Constitution of the United States, Article 1, Section 9, of the Constitution of the State of Texas, [fol. 19] or the federal laws, and does not set forth as is required by the Fourth and Fifth Amendments of the Constitution of the United States, and the Fourteenth Amendment of the Constitution of the United States. And Article 1, Section 9 of the Constitution of the State of Texas, a statement of the offense in clear, plain, intelligible language. The Court will note that we have here nothing more than hearsay, and I would like to bring the Court's attention to the case of U.S. ex al King vs. Gorky, in 32 Federal 2nd 93, at Page 795. There the appellant in Federal Court in construing the Fourth Amendment said, that if one makes an affidavit on hearsay, then it is nothing more than hearsay, and cannot be used as a basis of the issuance of a search warrant. The Justice of the Peace in this case had no jurisdiction to issue a search warrant in view of the fact that there was no statement of fact before the Justice of the Peace to justify the issuance of the search [fol. 20] warrant, and to give him jurisdiction thereof. The very early case of Landa v. Overt, a 1912 case from this State, supports the same proposition, that if you are going to set forth a statement of facts, it must be done in clear, concise statement of the violation of the law. The very recent case, which I participated in, Giardinello v. United States, practically a statute, just like this affidavit here, practice our statutes 725-B. The Supreme Court of the United States in reversing the case, said this is nothing more than a recitation of conclusions and does not set forth the facts as required by the Fourth Amendment and they reversed the decision although they had found six ounces of heroin in the man's hand. I submit that under all of the prevailing federal laws and the 14th, and the Fourth and the Fifth Amendment of the Constitution of the United States, this [fol. 21] search warrant, and affidavit for the search

warrant, is nothing more than hearsay. It does not give the Justice of the Peace jurisdiction to hear and consider and issue the search warrant, and, therefore, the search warrant is void and anything found as a result of the search warrant is likewise inadmissible under Mapp v. Ohio, and Article 727-A of the Code of Criminal Procedure. For those reasons, we object to this officer testifying as to anything he might have found on the premises. Further, the officer testified that he forced the door. He did not give a reasonable opportunity for the occupants of the premises to open the door, therefore, he has violated the federal Constitution again, and also violated a state law, which requires notification to the occupants before one may use force to break open the door. The search warrant is void for all these reasons. It is nothing more than—the Court will note the arrest warrant por-
[fol. 22] tion of it. It is a blanket search warrant. It authorizes the arrest of Nick Aguillar, a Mexican male, and others unknown to the affiants. And I submit that this is an unauthorized authorization by the Justice of the Peace, because the Constitution of the United States, Articles Four, Five and Fourteen, and our own constitution requires that the persons to be arrested be particularly named. And a blanket search warrant such as we have here is void and any evidence secured or found as a result of the issuance of such a search warrant is inadmissible in a state proceeding under the case of Mapp v. the United States, and under our own statutes, Article 727-A of the Code of Criminal Procedure.

For these reasons, I object to the officer testifying as to any of the fruits found as a result of the execution of this void search warrant.

THE COURT: That's overruled, counsel.

MR. WOODY: Note my exception, Your Honor.

[fol. 23] THE COURT: Yes, sir, counsel.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 3.

THE COURT: Bring the jury back, Mr. Treadway.

MR. WOODY: May I simply reiterate all of these objections, that is, to renew my objection throughout

without restating them all in the presence of the jury to save the Court the time and . . .

THE COURT: Insofar as this one point is concerned, yes, Mr. Woody.

MR. WOODY: Right, Your Honor.

THE JURY RETURNED TO THE JURYBOX, AND THE FOLLOWING TESTIMONY WAS HEARD IN THE PRESENCE OF THE JURY.

DIRECT EXAMINATION CONTINUED

BY MR. ZGOURIDES:

Q. Mr. Strickland, I believe you testified right prior to the jury being retired that sometime after 5:00 o'clock in the evening, that you went to 509 Pinkney Street, that you had gone to the front door with some other officers, knocked on the door, and informed the occupants there that you were armed with a search warrant, am I correct on that?

[fol. 24] A. Yes, sir, we told him we were police officers.

Q. All right, at that time did you hear a voice or not?

A. We knocked, and a voice asked who was there.

Q. All right, then what, if anything, did you do when you heard the voice reply, who was there, or who is it?

A. We replied that we were police officers and we had a search warrant for that location.

Q. All right, then did you hear anything at that time?

A. Yes, sir, we heard someone scuffle and start to run inside of the house.

Q. All right, when you informed the voice that you were police officers and that you were armed with a search warrant, did someone come to the door and open the door?

A. No, sir.

Q. All right, was that when you heard the scuffling

A. Yes, sir.

Q. And what did you do when you heard the scuffling and the running noise?

A. We jerked the screen door, which was latched—Officer Rodgers did. I opened the wooden door, which opened into the house, and saw the defendant running through the house.

MR. WOODY: Your Honor, do my objections and exceptions, which I made in the absence of the jury, [fol. 25] go to all of this testimony on this particular . . .

THE COURT: On this particular point, yes, counsel.

MR. WOODY: Thank you, Your Honor.

MR. ZGOURIDES CONTINUES:

Q. Now, you say you saw the defendant running, are you referring to this defendant, Nick Alford Aguillar?

A. Yes, sir.

Q. Will you point him out?

A. That is Nick Alford Aguillar there.

Q. The one who is sitting next to Mr. Woody, counsel for the defense?

A. Yes, sir.

Q. Now, in which direction did he run?

A. Towards the rear of the house.

Q. All right, would you describe for the benefit of the jury what rooms you had to go through, if there was more than one room?

A. The defendant, originally, started running from the living room, and he ran through a bedroom, through a kitchen, and into the bathroom in the rear.

Q. Did you enter the door when you opened it?

A. Yes, sir.

[fol. 26] Q. And did you pursue the defendant?

A. Yes, sir, I did.

Q. And did you pursue him through the living room, the bedroom, the kitchen and into the bathroom?

A. Yes, sir.

Q. And what, if anything, occurred in the bathroom?

A. When he got into the bathroom he pushed a package into the commode and flushed it.

Q. By flushing it, do you mean pulling the lever on it?

A. Yes, sir, by pulling the lever on the commode, and as he did this Officer Rodgers pulled him away from the commode and I retrieved the package before it could go down the drain.

Q. All right, now, when you say "he pulled the lever on the commode", and that "he put a package in the commode", who are you referring to?

A. To the defendant, Nick Aguillar.

Q. I believe you testified that Officer Rodgers pulled the defendant away and you retrieved the package from the commode, am I correct in that?

A. Yes, sir.

Q. Did you, at that time, conduct any further search of the house?

A. After?

Q. Yes, sir.

[fol. 27] A. After we retrieved the package, the defendant was presented with the search warrant and was allowed to read it, and then we commenced a search of the residence.

Q. And, of course, prior to that time you had informed the voice that you heard inside that you had a search warrant, and that is when you heard the running, am I correct in that?

A. Yes, sir.

Q. No one came to the door and opened the door for you?

A. No, sir.

Q. All right, after you conducted your search of the premises there at 509 Pinkney Street, did you or did you not place this defendant under arrest?

A. Yes, sir.

Q. And did you, subsequently, take him down to the police station?

A. Yes, sir, he was taken down there.

Q. What did you do with the package that was retrieved from the commode there, Officer Strickland?

A. It was tagged, dated and initialed by all of the officers involved in the case, and dropped in the locked box on the fourth floor of the police station.

Q. Would you describe what the package was that you retrieved from the commode?

[fol. 28] A. It was a package wrapped in clear cellophane with a rubber band around it, and inside of the package were six individual blue cellophane packages, containing white powder.

Q. All right, what did you do with the cellophane package that had the rubber band around it that con-

tained the six blue cellophane papers with some white powder in them?

A. We initialed them, dated them and dropped them in the locked box in the Identification Bureau on the fourth floor of the police station.

MR. ZGOURIDES: I would like to have this white envelope marked for purposes of identification as State's Exhibit No. 1, if it please the Court.

THE COURT: Mark it, Mr. Smith.

(It was so marked by the court reporter).

MR. ZGOURIDES CONTINUES:

Q. I show you what has been marked as State's Exhibit No. 1 for purposes of identification, Mr. Strickland, and ask you if you can identify that exhibit?

A. Yes, sir, I can.

Q. And what is it?

A. It is the six . . .

[fol. 29] MR. WOODY: Your Honor, do my objections go to all of this?

THE COURT: Yes, counsel, same objection, same ruling, and same exception.

THE ABOVE IS THE SAME AS DEFENDANT'S BILL OF EXCEPTION NO. 3.

MR. ZGOURIDES CONTINUES:

Q. You can answer that, Officer Strickland.

A. That is the white envelope in which we placed the six blue papers of clear white powder in.

Q. And how do you identify the envelope?

A. By my initials here.

Q. After you initialed this envelope did anyone else initial this envelope?

A. Yes, the other officers in the case did.

Q. You took the cellophane package with the rubber band around it and the six papers that were in it and placed them in that envelope and identified it with your initials on it, am I correct in that?

A. Yes, sir, I did.

Q. Did the other officers also do that?

A. Yes, sir.

Q. And then what did you do with this envelope? [fol. 30] A. This envelope was then placed in the locked chemists' box on the fourth floor of the police station.

Q. All right, would you describe that box for the benefit of the jury, please, Mr. Strickland?

A. It is a tall box built into a cabinet with a slot on top of the box. The box has three locks on it, and the only people that go into the box are the three chemists. They each have a key, and whan they unlock the three locks, that's when they take the evidence out.

Q. And then you placed it in the slot in that locked box, am I correct in that?

A. Yes, sir. You put it in the slot at the top of the box and it falls to the bottom of the locked box.

Q. Now, would you open the package marked State's Exhibit No. 1, please?

A. Yes, sir.

Q. All right, you've got in your hand there some blue cellophane packages, would you tell the jury whether you have any means of identifying that?

A. Yes, sir, these are the six papers that we got from the defendant and put into the box, and I identify them by my initials on them.

Q. Those six papers then were the ones that were placed in this envelope, marked State's Exhibit No. 1, for [fol. 31] identification purposes, and dropped in the locked box at the police station, am I correct in that?

A. Yes, sir, they are the ones.

Q. And this place where these facts occurred, at 509 Pinkney Street, is here in Houston, Harris County, Texas, is it not?

A. Yes, sir, it is.

Q. And these six papers are the ones that you recovered from this defendant, Nick Alford Aguillar?

A. Yes, sir.

MR. ZGOURIDES: I pass the witness, Your Honor.

CROSS EXAMINATION

QUESTIONS BY MR. WOODY:

Q. Did you make a report of this transaction and a statement concerning it immediately, or very close to the time of the arrest, officer?

A. Would you repeat your question, please?

Q. Did you make a report of this transaction shortly after you got the defendant to the police station?

A. After the evidence was tagged, there was a report made, yes, sir.

Q. And you cooperated in making this report?

A. I believe I made the report.

[fol. 32] Q. You made the report?

A. Accompanied by Officer Rodgers.

Q. Sir?

A. Officer Rodgers and myself made the report.

Q. And when did you last read this report?

A. A short time before I came to the courtroom.

Q. Just before you came into the courtroom today?

A. A short time, yes, sir, before I came into the courtroom today.

Q. Well, it is now 3:15, would you say it was within the last hour?

A. It was probably longer than that, Mr. Woody. It was probably about an hour and a half or two hours ago when I read it, glanced over it.

Q. But anyway, since lunch you have read this report and refreshed your memory?

A. Yes, sir.

Q. Do you have a copy of that report with you?

A. No, sir, I don't.

Q. Who has it?

A. One of the officers.

Q. One of the officers outside?

A. Yes, sir.

Q. And I believe Mr. Zgourides has a copy of the report also?

[fol. 33] A. I would imagine he does, yes, sir.

Q. That is the usual procedure, that he has one?

A. The District Attorney usually gets a copy of the report.

Q. Well, he always gets a copy of the report?

A. He is supposed to get a copy, but whether or not he gets a copy, I don't know.

MR. WOODY: At this time, Your Honor, we move the Court to direct the officers to step outside and get the report that he has refreshed his memory from in order that we may use it to cross examine him.

THE COURT: That request is denied, counsel.

MR. WOODY: Note my exception, Your Honor.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 4.

MR. WOODY CONTINUES:

Q. Officer, isn't it true that you kicked the door in—rather than open the wooden door, isn't it true that you kicked it in, you or one of the other officers accompanying you?

A. No, sir.

[fol. 34] Q. And kicked one of the hinges off of it?

A. No, sir.

Q. How many officers were there out there?

A. At the location?

Q. Yes, sir.

A. I will have to count them up, Mr. Woody. It was seven or eight, I believe, six or seven.

Q. And some of them came in the back rear door and some of them came in the front door?

A. Yes, sir.

Q. And you all met inside?

A. After it was all over, I guess you could say we met.

Q. After you kicked off the doors, you met inside?

A. There weren't any doors kicked off, Mr. Woody.

Q. Well, were they forced open?

A. The screen door was jerked in front.

Q. How about the rear door?

A. I don't know if the rear door was forced open or not, sir, as I was busy catching the defendant.

Q. Agents Ripa or Kelly, I haven't seen them here today, have you?

A. Before I came into the courtroom, no, sir, I didn't.

Q. You were working in connection with Agents Ripa and Kelly?

A. No, sir, they happened to be in our office and went [fol. 35] along with us on the warrant.

Q. Oh, they just happened to be there?

A. Yes, sir, they did.

MR. WOODY: I believe that's all.

MR. ZGOURIDES: No further questions.

* * * *

B. J. RODGERS,

called as a witness on behalf of the STATE, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. ZGOURIDES:

Q. State your name to the Court and to the jury, please, sir.

A. B. J. Rodgers.

Q. And what is your occupation or profession, Mr. Rodgers?

A. I am a policeman for the City of Houston Police Department.

Q. And to which division are you assigned?

A. I am in Homicide right now.

Q. Back on or about the 8th day of January, 1960, to which division were you assigned?

A. To the Narcotics Division.

[fol. 36] Q. How long were you a narcotics officer?

A. I was in that division about seven years.

Q. And how long have you been with the City of Houston Police Department, Officer Rodgers?

A. It is a little better than eleven years now.

Q. Along about the 8th day of January, 1960, did you have an occasion, along with Officer J. J. Strickland to proceed to the premises at 509 Pinkney Street, in Houston, Harris County, Texas?

A. I did, yes, sir.

Q. And had you, prior to that time, gone to the Justice of the Peace Court with Officer Strickland and sworn out a search warrant?

A. Yes, sir.

Q. And armed with that search warrant, you went to this address, didn't you?

A. Yes, sir.

Q. And what happened when you got to that address?

A. I, along with Officer Strickland, went to the front door where I knocked, and we heard someone running and it sounded like a table had been knocked over, or something, and I pulled the screen open, the hook straightened out and it came open, and, as I remember, Officer Strickland opened the front door and saw the defendant running towards . . .

[fol. 37] MR. WOODY: I object, Your Honor, to anything he might have seen or observed until he showed that he was legally on the premises.

THE COURT: Counsel, do you want your same objection?

MR. WOODY: Yes, sir, Your Honor, the same objection I made to Officer Strickland's testimony, and I would make the same objection to Officer Rodgers' testimony, Your Honor.

THE COURT: All right, the same objections, the same ruling, and the same exception.

MR. WOODY: Thank you—may I have a running exception in order that I may not have to interrupt . . .

THE COURT: Yes, on that particular point.

MR. WOODY: Yes, the illegal search.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 5.

MR. ZGOURIDES CONTINUES:

Q. Had you knocked on the door?

A. Yes, sir, we had.

[fol. 38] Q. And did you hear a voice or anybody answer the knock?

MR. WOODY: We object to him leading the witness, your Honor.

THE COURT: All right, don't lead the witness, counsel.

Q. What did you hear when you knocked on the door?

A. I heard someone scrambling and it sounded like a table or something had been pushed around. I don't know exactly what it was I heard. I just heard some rumbling or rustling going on.

Q. Had you informed the person on the inside that you were police officers armed with a search warrant at that time?

MR. WOODY: I object to that. Your Honor, he continues to lead his witness.

THE COURT: Yes, don't lead the witness, counsel.

MR. ZGOURIDES: I would like to finish my question, Your Honor, and then he can object all he wants to.

MR. WOODY: He is suggesting the answer, Your Honor, and by that time it is too late to object.

[fol. 39] THE COURT: All right, don't lead him, counsel.

MR. ZGOURIDES CONTINUES:

Q. What did you do after you knocked on the door?

A. We said, police officers.

Q. And then what happened when you notified whoever was inside that you were police officers?

A. That is when it sounded like someone was running, and I . . .

Q. And then what happened when you heard what appeared to you to be someone running?

A. That is when I pulled the screen open and Officer Strickland went in the door. We saw the defendant, and he seemed to have just gotten around a small tray or coffee table where he had been eating and watching television, and we chased him through—let me see, the living room, and I believe it was a couple of other rooms, and into the bathroom.

Q. All right, in other words, were you going just straight back when you were chasing him?

A. Yes, sir, we were going right straight through the house. He had to turn in the kitchen to get through to the bathroom.

Q. Was the kitchen the third room then?

[fol. 40] A. Yes, sir, I believe it was.

Q. Was there a room between that and the living room?

A. Yes, sir, I believe it was a bedroom. There was a bunch of junk, or a bed and a bunch of old clothes and stuff in there.

Q. Then what happened after the defendant got to the bathroom?

A. He threw a small package into the commode.

Q. What happened after he threw that small package into the commode, Officer Rodgers?

A. I got ahold of him from the back and lifted him away from the commode, and Officer Strickland reached and got a small plastic package.

Q. Would you describe that package, please?

A. It was wrapped in plastic and had a rubber band around it. I believe it was blue plastic, and I tagged it and initialed it.

Q. I will show you what has been marked for purposes of identification an envelope, State's Exhibit No. 1, and ask you if you can identify that envelope?

A. Yes, sir, I can.

Q. And how do you identify this envelope?

A. By my initials here on the upper right hand corner.

Q. All right, and what was done with the package that was retreived from the commode by Officer Strickland?

[fol. 41] A. It was taken by Officer Strickland, after it was initialed by us, and wrapped up and sealed into this envelope, and then it was dropped, along with these submission slips, in the locked box for the chemist's analysis.

Q. And did you witness the dropping of it into the locked box?

A. I did. I believe that Officer Chavez and I witnessed Officer Strickland dropping it into the box.

Q. I show you a piece of clear cellophane, or plastic, and ask you if that appears, or looks like, the blue papers were wrapped in?

A. Yes, it does.

Q. I show you a small package there with a piece of cellophane around it and some blue cellophane papers

inside of it, and ask you if there are any means by which you can identify that?

A. I can, yes, by my initials on this white piece of paper.

Q. And are those—that, along with this piece of cellophane, or plastic, here, are those the ones that were retrieved from the commode by Officer Strickland?

A. They was, yes, sir.

Q. And this then is the object that you saw the defendant throw into that commode, am I correct in that?

[fol. 42] A. Yes, it was.

MR. ZGOURIDES: I would like to have this marked as State's Exhibit No. 2, collectively, if it please the Court.

THE COURT: All right, mark it, Mr. Smith.

(It was so marked by the court reporter).

MR. ZGOURIDES: That being the blue cellophane package with cellophane around it, that is, cellophane or a piece of plastic here.

MR. ZGOURIDES CONTINUES:

Q. Who else was along with you in the way of police officers, Officer Rodgers, when this search occurred?

A. Well, as I remember there was I, and Officer Gartman was there, Officer Geffert, Officer Chavez, Officer Strickland, and two federal narcotics agents.

Q. All right, and Officer Strickland, Gartman, and Chavez, and Geffert are here today, are they not?

A. Yes, sir, they are.

Q. And this Officer Kelly, the narcotics officer, is that Jack Kelly?

A. Yes, sir, he is the agent in charge.

[fol. 43] Q. He is the agent that is in charge here in Houston, is he not?

A. Yes, sir.

Q. And he would be available to testify here today if we needed him, would he not?

A. Yes, sir, I believe he would be.

MR. ZGOURIDES: I pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. WOODY:

Q. Officer Rodgers, did you make a report of this incident shortly after you went to the police station with the defendant?

A. There was a report made, yes, sir.

Q. Did you participate in making the report?

A. I don't know who made the report, but I helped.

Q. Have you read the report over lately?

A. I haven't read it. I saw the report. I glanced at the report, but I didn't read it all.

Q. You read some of it today?

A. Yes.

Q. And how long ago was that, just before you came in here to testify?

A. It was about one o'clock, I imagine.

[fol. 44] Q. And it is now 3:25?

A. Yes.

Q. In about the last two hours, then, you have refreshed your memory from this report?

A. I glanced at a one-page offense report, yes.

Q. And that's the report that you and I are referring to, what is known as an offense report?

A. Yes.

Q. And you refreshed your memory from it today?

A. Yes.

Q. And within the last two hours?

A. Yes.

Q. Do you have a copy of it with you?

A. No, I don't.

Q. Who has?

A. I don't know where it is. I don't know who has it.

Q. Did it get lost outside or what?

A. I am sure it's not lost, but I don't know who has it.

Q. You don't have it on your person?

A. No, I don't.

Q. Do you know who you gave it to?

A. No, I don't.

MR. WOODY: At this time, Your Honor, we again

[fol. 45] move the Court to order the witness to step outside, or order the officer that has the report to bring it in in order that we may cross examine the officer to determine whether or not his memory, in fact, is refreshed or not.

THE COURT: That is denied, counsel.

MR. WOODY: Note my exception, Your Honor.

THE COURT: Yes, sir, counsel.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 6.

MR. WOODY CONTINUES:

Q. Who entered the front door with you, Officer Rodgers?

A. I, along with Strickland, I am sure of, and I believe Officer Gartman, but I am not sure of that. But I know that Officer Strickland and I went into the door about the same time.

Q. And who all came in the back door?

A. I don't know who all came in the back door.

Q. You do know that the other officers broke in the back door?

A. I don't know that the other officers came in the back door. I don't know who came in. I know that they came in, but when we arrested, or apprehended, Nick [fol. 46] there in the bathroom, the back door was still closed, as far as I know. There was no one else in there at the time.

Q. Did you see the other officers later on in the back of the house?

A. Yes, sir, I did.

Q. Mr. Kelly and Mr. Ripa and the other state officers —I mean city officers, rather?

A. I saw all of the officers around there. Whether or not they were all in the house when I saw them or not, I don't know.

MR. WOODY: I believe that's all.

MR. ZGOURIDES: That's all.

* * * *

THOMAS L. METZ,

called as a witness on behalf of the STATE, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. ZGOURIDES:

Q. State your name to the Court and to the jury, please.

A. Thomas L. Metz.

Q. What is your occupation and Profession, Mr. Metz?

[fol. 47] A. I am chemist and a toxicologist.

Q. And by whom are you employed?

A. I am employed by the Houston Police Department of the City of Houston.

Q. And how long have you been employed by the City of Houston Police Department as a chemist and toxicologist?

A. Not quite two and a half years.

Q. You were so employed back on or about the 8th day of January, 1960, were you not?

A. Yes, sir, I was.

Q. And will you please tell the Court and the jury what formal education you have had in the field of chemistry and toxicology, please, sir?

A. I have a Bachelor of Science degree in chemistry from Lamar State College of Technolgoy and a year of graduate school work in chemistry at the University of Houston, in chemistry.

Q. Now, since your formal education in the field of chemistry and toxicology, have you had occasions to examine substances by chemical analysis or otherwise to determine whether or not that substance contains a narcotic drug?

A. Yes, sir, I have.

Q. Have you done that on few or many occasions?

A. Many occasions, sir.

[fol. 48] Q. And, specifically, have you so examined substances to determine whether or not that substance contained heroin or not?

A. Yes, sir, I have.

Q. And have you, in your experience, had occasion to run few or many tests on a substance to determine whether or not it contained heroin?

A. On many occasions, sir.

Q. All right, and on how many times have you had occasion to do that?

A. Oh, I would say two thousand times, at least.

Q. All right, now, based on your experience and based on your formal education, in the field of chemistry and in the field of toxicology, do you feel qualified, Mr. Metz, to take a substance and run an analysis on that substance and determine, in your opinion, whether or not that substance is a narcotic drug, or whether or not it is heroin?

A. Yes, sir, I do. I feel very qualified.

Q. All right, I show you what has been introduced, or rather, marked for purposes of identification, as State's Exhibit No. 1, and ask you if you have had occasion to see that envelope?

A. Yes, sir, I have.

Q. And where did you see that envelope?

[fol. 49] A. The first time I saw this envelope was in a locked drawer on the fourth floor of the police administration building, at 12:00 noon, January 9th, 1960.

Q. And would you tell me, please, what was the condition of the envelope at the time you got it, was it sealed or unsealed, or torn or not?

A. The envelope was completely sealed. This Scotch tape I put on there myself.

Q. All right, what did you do with the envelope when you received the envelope?

A. I took it to the laboratory, recorded it, and examined the ingredients which were in the envelope.

Q. All right, I will show you what has been marked for identification as State's Exhibit No. 2, collectively, and ask you if you have had an occasion to see this clear, plastic piece of paper or cellophane, and the blue cellophane that is holding it?

A. Yes, sir, I have.

Q. Where did that come from, Mr. Metz?

A. These were the ingredients of the envelope.

Q. All right, did you have occasion to take the ingredients of the envelope there in what has been marked for purposes of identification as State's Exhibit No. 2, and run an analysis on those particular ingredients?

A. Yes, sir, I did.

[fol. 50] Q. And what was the result of your analysis?

M. WOODY: I object to this, Your Honor. This is again introducing into evidence that which has been illegally seized and which is the result of an illegal search and seizure, therefore, I object to the chemist testifying concerning it, just as to the introduction of it as to the testimony by the officers.

THE COURT: That is overruled, counsel.

MR. WOODY: Note my exception, Your Honor.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 7.

MR. WOODY: Do all of my exceptions that I made in the absence of the jury go to the chemist's testimony concerning this?

THE COURT: You have your exception on this particular point, yes, sir.

MR. WOODY: Thank you, Your Honor.

[fol. 51] MR. ZGOURIDES CONTINUES:

Q. In your opinion, please, Mr. Metz, what was the content of the ingredients of what has been introduced, or rather, what has been marked for purposes of identification as State's Exhibit No. 2, there in that blue cellophane paper, or papers?

A. My analysis revealed that the substance in these blue cellophane papers contained heroin.

Q. All right, did you further run on that an analysis to determine what percentage of heroin the papers were, please, sir?

A. Yes, sir, I did.

Q. And what percentage of heroin were they?

A. Well, my analysis revealed that the cellophane papers contained 36.5% pure heroin.

Q. All right, now, that would be the content of each paper containing 36.5% pure heroin, am I correct in that?

A. Yes, sir.
Q. How many grams of heroin would that be?
A. The total?
Q. Yes, sir.
A. Well, there is 36.5 grams per paper and there are six papers.
[fol. 52] Q. All right now, how many capsules of heroin can be made from six papers at 36.5% pure heroin?
MR. WOODY: I object to this, Your Honor. It is irrelevant.
THE COURT: That is sustained.

MR. ZGOURIDES CONTINUES:

Q. Now, have you had occasion there in your work as a chemist and toxicologist to run few or many tests on heroin?
A. I would say many tests.
Q. Have you had occasion to run few or many tests on capsules of heroin?
A. Many tests, sir.
Q. And what is the percentage of the normal capsule of heroin?
MR. WOODY: I would object to this, Your Honor. Certainly there is no materiality here, and he has not fled customs. I don't know what he is getting at, but it is certainly not material to any issue here what . . .
THE COURT: I will sustain that objection.

[fol. 53] MR. ZGOURIDES CONTINUES:

Q. All right, how many capsules of heroin would be produced from one paper of 36.5% of pure heroin?
MR. WOODY: The same objection, Your Honor.
THE COURT: The same ruling, sustained.
Q. If you know, of your own knowledge, what is the market price for one paper of 36.5% pure heroin?
MR. WOODY: I object to this, Your Honor. He has not been shown to be an expert. There has not been sufficient predicate laid and it is not material to any issue at hand.
THE COURT: I will sustain it.

MR. ZGOURIDES CONTINUES:

Q. Would there be a sufficient amount of heroin in one paper of 36.5% pure heroin for purposes of subcutaneous human injections?

MR. WOODY: Your Honor, I object to this, as he has not been shown to be an expert, and I think the jury certainly can take the knowledge of the fact that there [fol. 54] is . . .

MR. ZGOURIDES: Would you like to stipulate to it, then?

MR. WOODY: Certainly I am no expert in the field, and I don't think that this man has been shown to be and I don't see the materiality of it.

THE COURT: I will overrule that, counsel.

MR. WOODY: Note my exception, Your Honor.

THE COURT: Yes, sir, counsel.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 8.

MR. ZGOURIDES CONTINUES:

Q. You can answer the question.

A. Would you please repeat the question?

Q. Is there an adequate, or more than adequate amount of heroin in one of those papers of 36.5% pure heroin for purposes of subcutaneous human injection?

MR. WOODY: Note my objection, Your Honor, as there is not sufficient predicate laid.

THE COURT: That's overruled, counsel.

MR. WOODY: Note my exception.

[fol. 55] THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 9.

MR. ZGOURIDES CONTINUES:

Q. You can answer that.

A. There is much more than is needed for a subcutaneous injection.

Q. How many subcutaneous injections could be produced from one of those papers?

MR. WOODY: I object to this, Your Honor. It is not material to any issue at hand. It is not an issue here, and this man has not been shown to be an expert in that field.

THE COURT: That is overruled, counsel.

MR. WOODY: Note my exception, Your Honor.

THE COURT: Yes, sir.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 10.

Q. You can answer that, Mr. Metz.

A. I would say approximately 150 for one paper.

Q. All right then, if there are six papers there, approximately how many subcutaneous human injections [fol. 56] could come from the whole shebang, all of it?

A. It would be approximately nine hundred.

Q. Then the 36.5%, in effect, would have to be cut down, would it not, considerably?

A. That is correct.

Q. Cut down to what?

A. To approximately four or five percent.

Q. So then you would have the heroin that is in this paper cut down to four or five percent so that it could produce 900 subcutaneous human injections, am I correct in that?

A. Somewhere in that area, yes, sir.

Q. All right, now, how many subcutaneous human injections would come from one capsule of 4% pure heroin?

A. There is usually one injection, sir.

Q. All right then, approximately, how many capsules of 4% pure heroin could be produced from State's Exhibit No. 2 here?

A. Well, I would say it would be between seven and nine hundred.

Q. What is the fair, reasonable market value, if you know, of one capsule . . .

MR. WOODY: Certainly this is inflammatory, Your Honor, and . . .

[fol. 57] THE COURT: That is sustained.

MR. WOODY: Thank you, Your Honor.

MR. ZGOURIDES: We would, at this time, Your Honor, introduce into evidence State's Exhibit No. 2.

MR. WOODY: I will renew my objections that I made in the absence of the jury and all of them, Your Honor, that this is a result of an illegal search and seizure.

THE COURT: All right, the same objection, the same ruling and the same exception.

MR. WOODY: Thank you, Your Honor.

THE COURT: Are you introducing Numbers One and Two or what?

MR. ZGOURIDES: Number one is the envelope, Your Honor. We are introducing Number Two, the contents of the envelope only.

THE ABOVE-MENTIONED STATE'S EXHIBIT NO. 2 WAS RECEIVED INTO EVIDENCE AT THIS TIME.

THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 11.

[fol. 58] MR. ZGOURIDES: I pass the witness, Your Honor.

CROSS EXAMINATION

QUESTIONS BY MR. WOODY:

Q. Mr. Metz, how long did you say you have been a chemist?

A. I have been a chemist about three and a half years.

Q. You said a chemist and toxicologist, and you have been talking about, you have been talking in terms of toxicologist considerably, how many tests have you, individually, run on human beings with heroin?

A. On analysis?

Q. No, I am not talking about analysis, I am talking about what you were talking about just a while ago, the subcutaneous injections into a human being of 4% heroin, now, I want to know when and under what circumstances you conducted these tests?

A. I have never, personally, conducted tests of that nature.

Q. And as a matter of fact, you have never even seen anyone conduct any such test?

A. No, sir.

Q. Now, this business that you are telling the jury about this 4% heroin and all of that, you and I both know that you have never engaged in any sort of research [fol. 59] where you can say how much an individual would take heroin—how much heroin an individual would take subcutaneously under a doctor's orders or any other way, don't we?

A. All I know, sir, is from my experience in analyzing the heroin capsule, that is, the average capsule that we receive.

Q. All you are basing your contention on is certain tests where people have been picked up with it?

A. Correct, sir, and literature, of course.

Q. And literature?

A. Yes, reading literature and other things.

Q. Will you tell me some literature that indicates about this 4%, Mr. Metz?

A. Well, one is the United States Pharmaceutical Bulletin on narcotics and the other is . . .

Q. And which . . .

MR. ZGOURIDES: Your Honor, we would like to have the witness finish his answer to the question.

MR. WOODY: Well, all he can do is identify it.

THE COURT: Yes, let the witness finish his answer, counsel.

[fol. 60] THE WITNESS CONTINUES:

A. In any of the bulletins that are put out monthly, sir, the United States Bulletin on Narcotics.

Q. Well, which publication do you have reference to?

A. No specific one, sir. I would like to say it is a continuous—it's a reference put out monthly, and ever so often they will have articles, specifically, on heroin or opiates of some sort, or synthetics.

Q. And where did you pick up this 4% from any of these publications?

A. The four percent I refer to is usually the average—when I analyze a capsule of heroin, that is usually the average of it, sir.

Q. I wish you would tell the jury how you arrive at this percentage.

A. Four percentage?

Q. This percentage of heroin or any other opiate.

A. Well, we analyze it, sir.

Q. I understand you analyze it, but tell the jury how you analyze it.

A. Well, the process by which we analyze the heroin is to take a known amount, which is a weight amount, and then put it into solution in a six-tenths normal sulphuric, which is a weak sulphuric acid solution. We then make [fol. 61] it up to a known volume and then use an ultraviolet ratio recording spectometer to analyze it and from there, through another process, we can compute the percentage.

Q. You use that ratio . . .

A. Ratio recording.

Q. Spectometer?

A. Spectophotometer.

Q. There is nothing more than you know than if there is any heroin hydrochloride in a substance that is has a particular peak?

A. Yes, sir.

Q. And that is what you use it for?

A. Not just one peak, the complete absorbancy structure in the ultraviolet range is what we use it for.

Q. Come again?

A. Well, there are a number of peaks, the maximum and the minimum, in the ultraviolet range, is where the spectrophotometer operates, and the heroin has a particular one, of course.

Q. Well, of course, you are not looking at this ultraviolet light, you are not seeing it with the naked eye?

A. No, sir.

Q. Therefore, you are able to rely upon something else?

A. Well, the ratio recording spectrophotometer is an [fol. 62] instrument that automatically records the amount of absorbency of this molecule heroin in different amounts, therefore, you get a curve on a graph.

Q. Well, largely what you get is a graph—you get a graph and you don't even see the light?

A. No, sir, it's ultraviolet.

Q. It is the amount of light that goes through this green solution, I believe it is green, isn't it?

A. No, sir, it is a clear solution.
Q. I beg your pardon?
A. It is clear.
Q. It is a clear solution?
A. Yes, sir, just like water.
Q. I see, and you just read the peak and you know that heroin has a particular peak and that is the way you identify it?
A. Oh, no, sir, this instrument actually draws a graph on this special type of paper that is on the instrument, and you have a curve which is outlaid on the graph paper.
Q. Do you have the graph paper with you, maybe we can look at it.
A. No, sir, I don't.
Q. Where is it?
A. It is probably thrown away, sir
[fol. 63] Q. You don't have any of the reports there with you—I saw you referring to some a while ago; do you have any of your graphs or . . .
A. Yes, sir, I believe this is what you want here.
Q. Well, this is only some figures, and I am talking about some graphs that you . . .
A. Well, these are the figures that were taken off of the graph, sir, the graph paper, that is.
Q. And you have to interpolate this?
A. I calculate it, sir.
Q. You have to interpolate the graph, too, don't you?
A. We read it off the graph, yes.
Q. And you are figuring in such figures as .004?
A. That is correct, sir.
Q. And you say that you can read it that closely?
A. Well, that .004 is not read off of the graph, sir. That is the specific absorbency for heroin at . . .
Q. Where do you get that . . .
MR. ZGOURIDES: I would like counsel to let him finish the answer to the question, Your Honor. If he asks a question, he ought to let him answer it.
THE COURT: Yes, let the witness finish his answer, counsel.
[fol. 64] MR. WOODY: I didn't mean to interrupt him, Your Honor. I thought he was through.

MR. WOODY CONTINUES:

Q. If you don't read the .004 off of the graph, where did you get it from?

A. That .004 was taken from a paper by Bradshaw, who did experimental work on the analysis of narcotics and drugs, and that is the specific absorbency, which is the specific absorbency of heroin at 279 millimicrons.

Q. You indicated that you were rather familiar with the amount of heroin per capsule, now, the amount of heroin in each particular capsule, or the amount an individual would utilize, or need, or who could stand, would depend upon the tolerance of that particular individual?

A. That is correct, sir.

Q. As a matter of fact, you do build up a tolerance for heroin just as you build up a tolerance for anything else, any other drugs?

A. That is correct, sir.

Q. And the greater of the tolerance, of course, the greater would have to be your concentration of heroin?

A. Not necessarily, sir. The greater the tolerance the more often you would have to have it, or, like you say, [fol. 65] you could have a greater concentration, one of the two.

Q. Either of them?

A. Yes, sir.

Q. You said that you have done a year's post-graduate work out here at the University?

A. The University of Houston, yes, sir.

Q. Was that in chemistry or in toxicology?

A. In chemistry, sir.

Q. In which particular field of chemistry?

A. Organic chemistry, sir.

Q. And it had nothing whatsoever to do with toxicology?

A. Well, yes, sir.

Q. Did you run any tests on the human body to determine the tolerance of the human body for any of these drugs?

A. No, sir, not particularly to these. We went into toxicology such as the reaction of organic chemicals upon the human body, which is the reaction of organic chemicals and the inorganic chemicals upon the human body and the biological action that went through it, sir.

Q. Of course, you take that in your first year of organic chemistry, too?

A. Yes, sir, you take it all the way through.

Q. That's all organic chemistry is, is it not?

A. Well, it is a very wide field, sir.

Q. You have never been engaged in the sale of these [fol. 66] narcotics, personally, have you?

A. No, sir.

MR. WOODY: That's all, I believe, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. ZGOURIDES:

Q. The sale of heroin is prohibited by all laws, is it not?

A. That is correct.

Q. The counsel for the defense asked you the question about the greater the tolerance the greater the amount of percentage of heroin that is used by the body, am I correct in that?

A. Yes, sir.

Q. Isn't it the truth and the fact of the matter that the greater the tolerance the greater the addiction in the individual, am I correct in that?

A. That is correct.

Q. The other question posed to you, or one of the others, was something about the reaction of organic chemicals upon the human body, what is the reaction of heroin on the human body, Mr. Metz?

A. Well, heroin is an analgesic, or a pain-threshold, it lowers the pain-threshold of the body.

[fol. 67] Q. And this cannot even be dispensed for therapeutic purposes, or medical purposes, can it?

A. Heroin?

Q. Yes, sir.

A. No, sir, it cannot.

Q. It is just absolutely prohibited, period, is it not?

A. To the outside doctor, to the general doctor, that is correct.

Q. You say, in a sense, it is a pain depressant, was that your exact terminology?

A. It lowers the pain threshold.

Q. Then explain, in layman terms, if you can, please, just exactly how an individual reacts to heroin?

A. Well, the body would be relieved of any pain that is present. The circulatory system would probably be increased, respiration increased, and pupils dilated, and a person would just not have the normal use of his body.

Q. All right now, heroin is a narcotic drug, is it not, Mr. Metz?

A. Yes, sir, it is.

MR. ZGOURIDES: I pass the witness, Your Honor.

[fol. 68] RECROSS EXAMINATION

QUESTIONS BY MR. WOODY:

Q. Did you say that heroin is absolutely prohibited?

A. Yes, sir.

Q. By virtue of what law?

A. I believe it is the 1927 Harrison Narcotic Act, sir.

Q. Are you an attorney?

A. No, sir, I am not.

Q. What provision of the Harrison Act do you have reference to?

A. Now that I do now know, as to the exact provision. To my knowledge, I know it is the Harrison Act. I am pretty sure it is the Harrison Act that prohibits the possession of heroin.

Q. Well, don't you know, as a matter of fact, if you know that much about the federal law, don't you know that as a matter of fact, it is not against the law to have heroin, that it is only against the law to have heroin not in or dispensed—not in and from the original stamped package, and I direct your attention particularly to Title 26, Section 4704, 4705, of the Harrison Act,

don't you know that's the fact, rather than what you just told Mr. Zgourides?

A. I have never read the complete act, no, sir.

[fol. 69] Q. Well, you have never read any provision that prohibits absolutely the use of heroin?

A. Yes, sir.

Q. Well, tell me which one it is.

A. I do not know the exact wording, except that it is unlawful to be in the possession of heroin, and, to my knowledge, I am very sure that it is the Harrison Narcotic Act.

Q. Well, the Harrison Narcotic Act is the federal narcotic act, dealing with narcotics, and when did you read this act?

A. This has been over the past two or three years. I don't know exactly when, sir.

Q. Would you say that the physical dependence on heroin is about the same as morphine?

A. No, sir, it is not.

Q. And how about the psychic or the emotion dependence liability, would you say that it is about the same as morphine?

A. Would you repeat that again, please?

Q. Would you say that the psychic or emotional dependence liability of morphine and heroin are virtually the same?

A. I would probably say yes, sir, on the psychic.

Q. And would you say that the rapidity of the tolerance [fol. 70] development of the two would be about the same, in other words, the addictive aspects of it?

A. No, sir, they are not the same.

Q. And how about dilaudid, how would it compare with the other two?

A. Dialaudid, to my knowledge, would be the lower of the three, sir, it would be heroin, morphine and dilaudid.

Q. You say that you are familiar with drugs, are you, and you are familiar with the adictment of the amount?

A. Yes, sir.

Q. Would you look at this circular that was contained in . . .

MR. ZGOURIDES: I object to counsel testifying, Your Honor.

Q. All right, just have a look at it.

A. Yes, sir.

Q. And see if that might refresh your memory, your recollection of it, Mr. Metz, just a bit.

A. To me this is nothing, sir.

Q. Sir?

A. To me that means nothing. It has no authoritative basis.

Q. It has no authoritative basis?

A. Not with the units which they have there, sir, in [fol. 71] comparison to other drugs.

Q. You are familiar with demerol, are you?

A. Yes, sir.

Q. Demerol hydrochloride?

A. Correct, sir. Well, demerol is a trade name.

Q. Yes, and does this appear to be a proper description of demerol hydrochloride?

A. Yes, sir.

Q. And on the pamphlet, along with the demerol hydrochloride, is there an indication by the manufacturer, indicating that morphine, heroin and dilaudid are essentially equal so far as the physical dependence liability is concerned, the psychic, or emotional dependence liability, and the rapidity of tolerance development, they are all virtually the same?

A. According to their units, yes, sir.

Q. What do you mean, according to their units?

A. Well, their units are not defined—what they have to do with this, just numbers, are there.

Q. Well, the numbers indicate that they are the same.

A. According to Winthrop, yes, sir. That company puts out demerol.

Q. That is a reputable company, is it not?

A. It is a pharmaceutical company, an ethical pharmaceutical company, yes, sir, duly licensed. I assume so, [fol. 72] sir, I don't know.

MR. WOODY: That's all I have now, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. ZGOURIDES:

Q. This dependence liability, or whatever it is, about all these narcotic drugs that he is talking about just falls down to this, he is just asking you if you can get addicted to one of those just like you can get addicted to heroin, the dependency liability meaning the amount that you have to take into your body?

A. I assume so.

Q. You can get addicted to heroin, can you not?

A. Yes, sir.

Q. And you certainly can get addicted to 900 capsules of 4% pure heroin, could you not?

A. Yes, sir.

MR. ZGOURIDES: I pass him back.

RECROSS EXAMINATION

QUESTIONS BY MR. WOODY:

Q. Have you ever observed any individual taking heroin to determine how many—how long it took to [fol. 73] become addicted?

A. No, sir.

Q. This is a speculative guess on your part, isn't it?

A. No, sir.

MR. WOODY: I believe that's all, thank you.

MR. ZGOURIDES: No further questions, Your Honor.

THE COURT: You may stand aside, please; call your next witness, please.

MR. ZGOURIDES: We would re-introduce all the exhibits into evidence, Your Honor.

MR. WOODY: Well, I would make all the objections that I made in the absence of the jury at the time he introduced them, Your Honor.

THE COURT: All right, counsel.

MR. WOODY: Is the Court overruling my objections?

THE COURT: Yes, sir.

MR. WOODY: Then note my exceptions, Your Honor.

THE COURT: Yes, sir, counsel.

[fol. 74] THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 12.

MR. ZGOURIDES: THE STATE RESTS, YOUR HONOR.

THE COURT: WHAT SAYS THE DEFENDANT?

MR. WOODY: THE DEFENSE RESTS, YOUR HONOR.

* * * * *

REPORTER'S CERTIFICATE

(omitted in printing)

* * * * *

[fol. 75] * * *

[fol 76] IN THE
CRIMINAL DISTRICT COURT OF HARRIS COUNTY

[Title Omitted]

THE COURT'S QUALIFICATION OF DEFENDANT'S INFORMAL BILL OF EXCEPTION—April 16, 1962

The Assistant District Attorney having refused to approve the foregoing statement of facts and the same having been presented to the Court for approval, the Defendant's Informal Bill of Exception No. 4 appearing on pages 31 through 33 and Defendant's Informal Bill of Exception No. 6 appearing on pages 43 through 45 are qualified, and it is hereby certified that the offense report as requested and demanded by the Defendant's attorney, and the only such offense report in the possession of the prosecution is shown by the following photostatic copy:

[fol. 77] OFFENSE REPORT

HOUSTON POLICE DEPARTMENT

Offense POSSESSION OF HEROIN
Complainant State of Texas
Address
Reported by Officers
Where Committed 509 Pinckney
Date and Time of Occurance 1-8-60 5:20PM
Received by Officers
Hensley-Records

* * * *

Date-Time 1-8-60 5:20PM
1-8-60 7:20PM
How On view person

Details of Offense - Suspects - Persons Arrested - Property

At approx. 4:00PM this date, 1-8-60, officers rec'd reliable information from a credible person who did believe that one Nick Alfred Auguillar (LAM) (31) who lives at 509 Pinckney had on, or about, his person a quantity of heroin. Officers B. J. Rogers and J. J. Strickland, went to Judge Ragan's Office and rec'd Narcotic search warrant for the above location.

Officers went to the above location, and executed the search warrant. As Officers J. J. Strickland and B. J. Rogers entered through the front door, followed by Officers R. G. Gartman and A. J. Geffert we chased Nick Aguillar through the house, to the bath room, which is located in the extreme rear of the house and the subj. threw a small celophane package into the commode, and flushed the commode at the same time. Officers Strickland stuck his hand in the commode and fished out the small package, witnessed by Officers Rogers, and Chavez who had entered through the back door along with M. E. Gentry and W. A. Purdue and Jack Kelley and John Ripa.

Officer Strickland opened the small celophane package and found that it contained six papers of Heroin which were individually wrapped in blue celophane paper. The Narcotics was given a reagent test in station 781 and the results were positive. The Narcotics were then initialed dated, sealed in an envelope which was initialed by all officers and dropped in the chemists locked box for his analysis, by Officer Strickland at 7:15PM this date, 1-8-60, witnessed by B. J. Rogers and M. Chavez.

The subj. was brought to station 351 where a hold was obtained for Narcotics and charges of Possession of Heroin were filed on this subj. in Judge Ragan's Court this date.

* * * *

[fol. 78] ARRESTED: Nick Alfred Aguillar (LAM) (31) 509 Pinckney

Officers B. J. Rogers—J. J. Strickland, R. G. Gartman, M. Chavez, A. J. Geffert, M. E. Gentry, W. A. Purdue, Jack Kelley

* * * *

[fol. 79] As so qualified, Defendant's Informal Bills of Exception No. 4 and 6 are approved and the statement of facts is approved as being a true, complete and correct statement of facts of all the evidence adduced and proceedings had upon the trial of the above styled and numbered cause.

Signed this 16th day of April, 1962.

/s/ E. B. Duggan
EDMUND B. DUGGAN, Judge
Criminal District Court

APPROVAL OF THE STATEMENT OF FACTS

It is agreed that the foregoing statement of facts, including the qualifications of the Defendant's Informal Bills of Exception No. 4 and 6, is a true, complete and correct statement of facts of all the evidence adduced and the proceedings had upon the trial of the above styled and numbered cause, had in said Court at said term.

Witness our hands this 16th day of April, A.D. 1962.

/s/ Gus J. Zgourides
GUS J. ZGOURIDES
Assistant District Attorney
Harris County, Texas

_____
Attorney for Defendant

the same contraband that was introduced into evidence in this case.

Q. This is something that you are assuming, is it not, Mr. Woody?

A. No, I am not assuming it. It was all brought out in the evidence presented.

Q. But there wasn't any evidence taken, was there?

A. Of course there was. All of the evidence on this issue was taken yesterday.

Q. But there was no contraband introduced in evidence in the Federal Court yesterday, was there?

A. No sir.

Q. And you have no knowledge of any contraband as to when it will be introduced, do you?

A. No sir. But the Federal Law in Section 41-E in any trial or hearing to supress evidence it is not necessary to introduce any evidence or contraband, at that time.

MR. ZGOURIDES: We object to that answer, as it calls for a conclusion, if the Court please.

MR. WOODY: I can show that due to my experience in Federal Court, Judge.

[fol. 96] THE COURT: Restrict it to your knowledge, Counselor, of the State law. What does it provide?

MR. WOODY: The Federal Law in Section 41-E, Your Honor, provides that . . . .

MR. ZGOURIDES: We object to any law in Federal Court, if the Court please.

THE COURT: Of course, the Court of Criminal Appeals of the State of Texas has ruled on that, I am sure. What is that ruling?

MR. WOODY: It is the law in this instance, Your Honor, and where I have tried cases in the Federal Courts, and I am licensed to practice in the Federal Courts of the United States and also in the Civil Appellant Courts of the United States, and it has been my experience in hearings in the Federal Court to suppress evidence that it is not necessary to introduce any evidence and that is the reason no evidence was introduced by me at that time in that case.

[fol. 97] MR. ZGOURIDES CONTINUES:

Q. Are you willing to stipulate that there was no evidence yesterday?

A. There was no evidence introduced yesterday. There was only evidence of probable cause and the Search Warrant introduced.

Q. And there has been no ruling on it yet by the United States District Court?

A. That is true, but I am expecting a ruling on it today.

MR. ZGOURIDES: That's all I have, Your Honor.

THE COURT: Your Motion is over-ruled, Mr. Woody.

MR. WOODY: Note my exception, please, Your Honor.

THE COURT: Yes sir, Counsel.

(THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 1).

(The Court sentenced the Defendant)

MR. WOODY: Your Honor, I haven't had the opportunity to state to the Court my reason for filing that Motion, I don't believe, but it was filed and the evidence put on in that Motion in opposition to the Court assessing the sentence of punishment at this time, and we except to [fol. 98] the ruling of the Court at this time and give notice of appeal to the Court of Criminal Appeals sitting in Austin, Texas.

THE COURT: All right.

(THE ABOVE IS DEFENDANT'S BILL OF EXCEPTION NO. 2).

* * * *

REPORTER'S CERTIFICATE (omitted in Printing)

[fol. 80]

IN THE CRIMINAL COURT OF HARRIS COUNTY

DEFENDANT'S EXCEPTIONS TO QUALIFICATIONS OF DEFENDANT'S INFORMAL BILLS OF EXCEPTIONS NOS. 4 AND 6

Comes now Nick Alford Aguilar, by and through his attorney of record, Clyde W. Woody, who after being sworn on oath excepts to the Court's qualifications of the Defendant's Informal Bills of Exception No. 4 and 6 for the following reasons:

The Defendant in this cause has been denied equal protection of the law as guaranteed by the Constitution of the United States and due process of law as guaranteed by the Constitution of the United States, in particular the Fourteenth Amendment. The Defendant herein has also been deprived of effective assistance of counsel guaranteed by the Constitution and laws of the United States and the Constitution and laws of the State of Texas in the following particulars.

The Statement of Facts, as verified by the Official Court Reporter of the Criminal District Court of Harris County, Texas, to-wit: Philip B. Smith, was delivered to counsel for appellant and approved on the 26th day of March, 1962. Thereafter the Assistant District Attorney, Gus J. Zgourides, in collusion with other person or persons and in the absence of the defendant or his counsel, appeared before the Hon. E. B. Duggan on the 16th day of April, 1962, and there presented to said judge certain unsworn instruments concerning the Defendant's Informal Bills of Exceptions No. 4 and 6. That on the 16th day of April, 1962, while the Defendant's rights were being considered by the trial court, the defendant was in the County Jail of Harris County, Texas and his counsel was in his office approximately two blocks from the courthouse. That neither the trial judge nor the assistant district attorney notified counsel for the defendant that [fol. 81] any hearing was to be conducted concerning a qualification of the Defendant's Informal Bills of Exceptions No. 4 and 6. That had counsel for the state notified the defense counsel that a hearing was to be

had concerning the substantive rights of the defendant, then the defendant would have been represented at this hearing by the attorney of record for the defendant. The first notice that counsel for the defendant had of this proceeding was the morning of the 17th day of April, 1962, after the court had acted on the State's motion to qualify the Defendant's Informal Bills of Exceptions No. 4 and 6. Thereafter, counsel for the defendant proceeded to the office of the assistant district attorney in this case, Gus J. Zgourides, and informed him that he desired to have a hearing on the attempted qualifications. That Mr. Zgourides summonded Mr. Carl E. F. Dally and it was then explained to counsel for the defendant that this proceeding had been utilized by the State due to the fact that the Assistant District Attorney tried to circumvent the holding in Gaskin v. State, 353 S.W.2d 467, and other recent decisions from the Court of Criminal Appeals concerning the Defendant's Informal Bills of Exceptions No. 4 and 6. That counsel for the defendant asked the Assistant District Attorney to accompany him to the trial judge for a hearing on this matter and the Assistant District Attorney, to-wit: Gus J. Zgourides, indicated that he had already talked to the judge about this matter in the absence of the defendant and his counsel and did not desire any further discussion with the trial court on this particular matter, and further that the court was involved in trial and was unavailable to engage in a hearing on this matter. Counsel for the defendant then and there promptly assured counsel for the state that this was not only an unauthorized, unorthodox [fol. 82] and illegal proceeding but was depriving the Defendant herein of a right to be heard and further that his qualifications were not true as a matter of fact. That the qualifications indicated by the trial court were not a part of the trial of this cause and therefore this dedefendant has been deprived of a Statement of Facts, notwithstanding the fact that the defendant purchased the same. The trial court approved the Statement of Facts as being true and correct and the Court further incorporated therein a qualification of the trial court, not verified, that the attached offense report was the only offense

report in the possession of the prosecution; however, it is not indicated the particular time that the court had in mind concerning the possession of the particular offense report, except by inference. This finding of fact by the trial court based on an unverified statement of the Assistant District Attorney, Gus J. Zgourides, who has now twice refused to produce the same at trial and has never furnished the defendant with a copy of the offense report nor has he allowed the defendant to cross-examine on this matter, deprives this defendant of effective assistance of cousel as guaranteed by the laws and Constitution of the United States and the laws and Constitution of the State of Texas and reduces this trial to a mockery.

The trial court did not see fit to qualify the Defendant's Informal Bills of Exceptions No. 4 and 6 in the presence of the defendant at the time of trial and the court is now without authority, in the absence of the defendant and without giving the defendant notice, to qualify the Defendant's Informal Bills of Exceptions No. 4 and 6.

[fol. 83] If the trial court is to certify as to matters within his personal knowledge, the defendant should have a right to cross-examine the trial judge as to the personal knowledge concerning these matters. If the Assistant District Attorney desires to incorporate any matters into the statement of facts which were not *adduced* at the trial, he should do so pursuant to the provisions found in Art. 759, which said provisions have not been complied with herein. The defendant has been deprived of a Statement of Facts and his Informal Bills of Exceptions. The trial court is wholly without authority to qualify his Informal Bills of Exceptions No. 4 and 6 without giving the defendant an opportunity to be heard and to introduce evidence in his own behalf; therefore, the defendant objects and excepts only to the court's qualification of the Defendant's Informal Bills of Exceptions No. 4 and 6 to the extent that it reflects a qualification of the Defendant's Informal Bills of Exceptions; however, the Defendant does not except to the approval of the Statement of Facts by the trial court as being a true, complete and correct Statement of Facts of all the evidence adduced and proceedings

had upon the trial of the above styled and numbered cause. The Defendant excepts to the approval of the Assistant District Attorney, Gus J. Zgourides, wherein he indicates that the qualification of the Defendant's Informal Bills of Exceptions No. 4 and 6 were a part of the Statement of Facts in this case.

The Defendant further excepts to the qualification by the trial court of the Defendant's Informal Bills of Exceptions No. 4 and 6 for the reason that the Court is completely without authority to qualify the Defendant's In-[fol. 84] formal Bills of Exception No. 4 and 6.

That the defendant, by and through his counsel, attempted to have a hearing on this matter on the 19th day of April, 1962, which was the ninetieth day and was a day when the court would ordinarily be in session and counsel for the defendant was notified at that time that the trial judge was unavailable. That Criminal District Clerk's office of Harris County, Texas informed counsel for the Defendant that Friday, the 20th day of April, 1962, which was the last day for filing the Statement of Facts and Bills of Exceptions, would not be opened for business and no Statement of Facts and Bills of Exceptions would be filed, as the Clerk's office would be closed. That the Defendant has exercised due diligence to secure a Statement of Facts herein and has been deprived from presenting a Statement of Facts by the procedure set forth hereinabove.

/s/ Clyde W. Woody
CLYDE W. WOODY
Attorney for Defendant

Duly Sworn to by Clyde W. Woody. Jurat omitted in Printing.

[fol. 85]

IN THE CRIMINAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

[Title Omitted]

* * * *

Hearing on Defendant's Motion In Opposition To The Court Assessing Sentence On Him.

* * * *

BE IT REMEMBERED, that upon the hearing of the above stated Motion in the above numbered and styled Cause, had in said Court at said Term, before the HON. E. B. DUGGAN, JUDGE OF SAID COURT, on the 19th day of JANUARY, A. D. 1962, and all parties having appeared in person and by their respective Counsel, the following evidence was adduced and facts proven, to-wit:

APPEARANCES

FOR THE STATE: Mr. Gus J. Zgourides and Mr. Carl E. F. Dally Assistant District Attorneys.

FOR DEFENDANT: Mr. Clyde W. Woody, 1114 Texas Avenue, Bldg., Houston, Texas.

[fol. 86] MR. GUS ZGOURIDES,

called as a witness by the DEFENDANT, and after having been duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. WOODY:

Q. State your name to the Court, please?

A. Gus Zgourides.

Q. You are an Attorney here in Houston, Harris County, Texas, are you not?

A. Yes, sir.

Q. And you are a prosecutor in this Criminal District Court, one of them that is assigned to this Court?

A. Yes, I am.

Q. Working for the District Attorney here in Harris County, Texas?

A. Yes.

Q. And you prosecuted the case in this Court of the State of Texas vs. Nick Alford Aguilar, No. 90264, that is set here today for sentencing, isn't that right?

A. Yes, I tried him in this Court for the State, that is true. I was an Assistant District Attorney for the State in his trial in this Court, twice.

Q. The last trial is the one I had in mind, which was had in this Court last September, 1961, and that was for [fol. 87] the offense alleged to have been committed on the 8th day of January, 1960, is that right?

A. Yes, as I remember it that was the date of the offense.

Q. And in that trial of this Defendant on the 6th day of September, 1961, in this Criminal District Court, the State introduced evidence, in fact, the State introduced in evidence a Search Warrant from was recovered some heroin, isn't that the basis of this case, isn't that correct, Mr. Zgourides?

A. I know there was a Search Warrant. I can't answer that question, truthfully, because I cannot state that that was the basis in the prosecution of the case, but I do know there was a Search Warrant in the case.

Q. Do you recall the testimony being virtually identical in the two cases that were tried in this Court against the Defendant, the first case being reversed by The Court of Criminal Appeals, and that he was tried here again in this Court the second time because of that reversal, isn't that true?

A. Yes sir, I think that is true.

Q. I show you a copy of the Search Warrant and that shows the address to be 509 Pinkney Street, does it not?

A. It does.

Q. And the basis of this prosecution in this case is this Search Warrant for 509 Pinkney Street, and the testi- [fol. 88] mony in this case shows that the evidence, allegedly, found there at 509 Pinkney Street, Houston, on the 8th day of January, 1960, was by the combined efforts of the State and Federal Narcotic Officer, was it not?

A. I will answer that question, yes. But I think that the verdict of the jury conclusively proved that the evidence found there was what it was and not, allegedly.

The jury found the defendant guilty so I would strike the word, allegedly, from your question.

Q. You were present yesterday in the U. S. District Court for the Southern District of Texas, Houston Division, when that Court, before Judge Allen B. Hannay, heard the Defendant's motion to Supress evidence in this case, were you not?

A. Yes, I was there.

Q. And I think you brought the Search Warrant with you, or you had a copy of it with you, isn't that right?

A. I had a copy of it with me, but I did not have charge of the one that was there.

Q. You did not have charge of the one that was in the U. S. Court over there?

A. No sir.

Q. And you knew it was the same Search Warrant, or a copy of the same one in this transaction that we are interested in here today in this case?

A. Truthfully, I don't know because I did not see the [fol. 89] Search Warrant they had, or the copy of the one they had, but I had a copy of it in my pocket at that time.

Q. Didn't you get the Search Warrant from the court reporter here and give it to Judge W. C. Ragan, Justice of the Peace here, so that he might take it over there?

A. No sir, I did not do that.

Q. You heard the hearing on the Motion over there on the evidence—that is, you heard the evidence in that Motion to Suppress evidence in this case, didn't you?

A. Yes sir.

Q. And you did recognize it as the same transaction as the evidence given in this case here?

A. I recognized some of the evidence as the same, yes.

Q. And it was on the same date, January 8th, 1960, was it not?

A. Yes.

Q. It being the same as was testified?

A. Yes.

Q. And the same Search Warrant was utilized in that hearing, was it not?

A. That would be a conclusion on my part, Mr. Woody.
MR. WOODY: That's all.

• • • •

[fol. 90] MR. CLYDE WOODY,

took the witness stand in the DEFENDANT'S BEHALF, and after having been duly sworn, testified as follows:

My name is Clyde W. Woody, I am an Attorney here in Houston, Harris County, Texas, and am the Attorney of record for the Defendant, Nick Alford Aguilar, in this case before this Court here. And I am also the Attorney of record in the case of the United States District Court for the Southern District of Texas, Houston Division vs. Nicholas Alford Aguilar, Anthony Garcia, John Cisneros and Gilbert F. Chaves, the number being 14326. There has been a Motion for the suppression of evidence filed in that Cause No. 14326 heard in The United States District Court before the Hon. Judge Allen B. Hannay, and the same Search Warrant was utilized in the trial of this case in this Court against the Defendant, and it was the same transaction and the . . . .

MR. DALLY: You Honor, we object to that testimony, that it was the same transaction.

MR. WOODY: I would like to know why it is not the same transaction.

THE COURT: You may continue, Mr. Woody.

[fol. 91] MR. WOODY CONTINUES:

Your Honor, the same officers testified in both cases against this defendant that were tried in this Court, and the same Search Warrant was utilized, and the same contraband was the subject and the basis of the prosecution in both cases. And the Motion to Suppress Evidence, the evidence that was obtained by this Search Warrant, allegedly, and the testimony heard thereon in this hearing, is now under advisement by the Hon. Judge Allen Hannay, who is the presiding Judge for the United States District Court, Southern Division, and who is handling the criminal docket in the United States District Court at this time. There was State and Federal Officers That executed this Search Warrant and took part in this same transaction and they testified . . . .

MR. ZGOURIDES: We object to that, if it please the Court, for the simple reason that upon the trial of this case in the Criminal District Court of Harris County, Texas, that there were only two State Narcotic Officers that actually testified in this case, and those two were Officers J. J. Strikland and B. J. Rodgers, and the tran-
[fol. 92] script of that case will show that no Federal Officers testified in the case that was tried in this Criminal District Court.

MR. WOODY: Is he testifying to that, Your Honor?

THE COURT: That is sustained as to that particular point, Counsel.

MR. ZGOURIDES: I am objecting to that particular testimony, Your Honor, as to all of the officers testifying in this case.

THE COURT: That is sustained. Is it your contention, Mr. Woody, that all of the witnesses testified at that time to the same thing—are you saying it is the same testimony?

MR. WOODY: No sir, Your Honor. I am saying that it is the same officers that made the cases in both instances, Judge.

THE COURT: All right, you may continue, Counsel.

MR. WOODY: That's all I have, Your Honor.

CROSS EXAMINATION

QUESTIONS BY MR. ZGOURIDES:

Q. Isn't it true, that the only officers that testified at
[fol. 93] the trial of the Defendant in this Court, styled The State of Texas vs. Nick Alford Aguilar, in Cause No. 90264, on September 6th, 1961, in which I was the Prosecutor and you were the Defense Counsel, were City of Houston Police Officers J. J. Strickland and B. J. Rodgers, and the City of Houston Police Department Chemist, Thomas Metz, isn't that true?

A. I don't know who they were, but I know what was testified to in the first case and the one in which I was Defense Counsel.

THE COURT: You say that you don't know who testified, Counsel, in the case you tried in this Court for this man?

MR. WOODY: Your Honor, I know that two officers testified, yes, but I don't recall their names.

THE COURT: This Defendant has been tried in this case in this Court, Counsel, and has not been sentenced. No final action, or a ruling made, on the Motion in Federal Court.

MR. WOODY: It is under advisement at this time, Your Honor, but no ruling has been made on it unless it has been made this morning.

[fol. 94] MR. ZGOURIDES CONTINUES:

Q. There is no ruling pending in the United States District Court for the Southern District of Texas, Houston Division, entitled The State of Texas vs. Nick Alford Aguilar, is there?

A. To my knowledge, the Judge took it under advisement yesterday afternoon and I have not been advised whether or not a ruling has been made on it.

Q. And on that action yesterday in the United States District Court there was no alleged contraband introduced in evidence, was there?

A. No sir, there was not.

Q. And there has been no adjudication recorded in the Minutes of that Federal Court, has there?

A. No, there has not been, to my knowledge.

Q. And there has been no date set for the trial of this Defendant in that Court, has there?

A. There is a tentative date for the 22nd of January, 1962, which is next Monday.

Q. But there has been no action on the adjudication itself, has there?

A. No.

Q. And so, actually, you don't know whether they are relying on this contraband, or on what contraband that they are relying on in the Conspiracy case, do you?

A. Yes.

[fol. 95] Q. Can you tell us?

A. Yes sir, I can—I most assuredly can. They put me on notice, that is, I was notified of the specific situation where they found it, what it was, and the date, and it is

[fol. 99]

IN THE CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS.

[Title Omitted]

* * * *

ATTORNEYS' AGREEMENT AS TO TESTIMONY

IT IS AGREED that the foregoing is a full, true and correct transcript of the testimony adduced and proceedings had upon the hearing of the Motion stated in the caption hereof in the above numbered and styled Cause, had in said Court at said Term.

WITNESS MY HAND this 26 day of March A. D. 1962.

/s/ Clyde W. Woody
Attorney for the Defendant.

WITNESS MY HAND this 16th day of April A. D. 1962.

/s/ Gus J. Zgourides
Assistant District Attorney
for the State of Texas.

* * * *

[fol. 100]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Appeal from Harris County

No. 34,681

NICK ALFORD AGUILLAR, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

OPINION—June 20, 1962

The conviction is for the possession of heroin; the punishment, twenty years.

On a former appeal this case was reversed. Aguillar v. State, 339 S.W. 2d 898.

When Officers Strickland and Rodgers announced at the front door of a house that they were police officers and had a search warrant for the house, they heard scuffling and movements inside, immediately entered, and saw the appellant run into the bath room. Strickland and Rodgers pursued the appellant into the bath room where they saw him throw a package into the commode and flush it. Rodgers pulled the appellant away, and Strickland retrieved the package from the commode.

While testifying, both Officers identified the appellant and the package which they testified he threw into the commode. The package, which contained six blue cellophane papers with a white powder in each of them, was introduced in evidence.

An analysis by a chemist of the substance in each of the cellophane papers showed that it was 36.5% pure heroin.

The appellant did not testify or offer any testimony, and no brief has been filed in his behalf.

An informal bill of exception shows that the trial court refused appellant's request that he be shown an offense report made by Officers Strickland and Rodgers. The report was not in their possession at the time each ap-

peared as witnesses, nor was it exhibited by the state at such time. But, they had used it to refresh their memory shortly before they testified.

[fol. 101] The offense report appears in the record. An examination of the report shows nothing therein which could have been used to impeach the testimony given by the witnesses Strickland and Rodgers. In the absence of any showing of injury or prejudice the court's refusal to require the production of the offense report is not ground for reversal. Moreno v. State, 341 S.W. 2d 450; Perdue v. State, 350 S.W. 2d 203; Hughes v. State, No. 34,685, Harris County, delivered June 13, 1962.

At the trial, appellant objected to the admission of the evidence showing the search and the results thereof for the reason that the search warrant was void. He attacks the affidavit on the ground that it is based on hearsay, did not set forth a statement of the offense in clear, plain and intelligible language, and was insufficient to authorize the issuance of the search warrant.

An examination of the affidavit shows that it recites sufficient facts and information to constitute probable cause for the issuance of the warrant. The affidavit and warrant being valid, no error is shown in the admission of the results of the search. Rozner v. State, 3 S.W. 2d 441; Ruhmann v. State, 22 S.W. 2d 1069.

The evidence is sufficient to suport the conviction, and no error appearing, the judgment is affirmed.

BELCHER, Judge.

(Delivered June 20, 1962.)

Opinion approved by the Court.

[fol. 102]

No. 34,681

IN THE COURT OF CRIMINAL APPEALS,
AUSTIN, TEXAS

[Title Omitted]

APPELLANT'S MOTION FOR REHEARING—Filed July 3, 1962

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Comes Now Clyde W. Woody, attorney of record for the Appellant, Nick Alford Aguilar, and files this the Appellant's Motion for Rehearing and would respectfully move this Honorable Court to set aside the affirmance in this cause rendered on June 20, 1962, for the following reasons:

I.

This Honorable Court has completely and wholly failed to consider the substantive issues of law raised by the Appellant herein and has further refused to consider the Federal Constitutional issues which were duly and timely raised in the trial court. This Honorable Court is under a duty to consider all of the Informal Bills of Exceptions reflected in the Statement of Facts, by virtue of the statutes governing the procedure to be utilized by this Court, particularly when the Appellant was not represented by counsel in the Appellate Court.

[fol. 103] This Honorable Court erred in the Opinion in the following particulars:

The Court herein held that the offense report appears in the record; however, if the Court carefully views the record, it will become abundantly clear to the members of this Honorable Court that the offense report is not a part of the record. This Honorable Court held on page two of the Opinion herein:

> "The offense report appears in the record . . . In the absence of any showing of injury or prejudice

the court's refusal to require the production of the offense report is not ground for reversal . . . ."

It will be noted that the trial court in the absence of the appellant, his counsel and of any showing except post trial hearsay statements made by the assistant district attorney that the attached report was the offense report that was requested and demanded by the counsel for the appellant and was the only offense report in the possession of the prosecution; however, the defense was never given an opportunity to make the determination or to examine or to present any evidence concerning this alleged offense report which the State had twice refused to tender during the trial either to the attorney for the defendant or to the court, but elected to proceed with an ex parte Star Chamber proceedings to develop the record which they had not seen fit to do during the course of this trial or during the prior occasion when this defendant was tried on this cause. This Honorable Court is in grievious error, as was the court below, when a finding of fact is made that the offense report appears in the record of this cause or was adduced in the trial of this cause as both such findings of fact, regardless of the tribunal making such fact finding, are not in keeping [fol. 104] with the facts.

The Court approved the Statement of Facts on the 16th day of April, 1962, as the Court's Statement of Facts and further qualified certain informal bills of exceptions. The trial court is without authority to qualify an informal bill of exception post trial, particularly in the absence of the defendant or his counsel. In addition thereto, if the trial court has the authority to qualify an informal bill of exception post trial, this qualification is destroyed completely by virtue of the fact that the appellant timely and promptly excepted to the trial court's qualification of defendant's informal bills of exceptions Nos. Four and Six in the same manner that the trial court attempted to qualify these informal bills of exceptions. The appellant's exception to this qualification were duly recorded and filed as required by Art. 760d of Vernon's Code of Criminal Procedure as amended in 1959, which became

effective May 12, 1959, and which was the controlling procedure at the time of the trial of this cause and the filing of this statement of facts, the attempted qualification of the informal bills of exceptions and the exceptions to the attempted qualifications by the trial court.

The trial court was allowed, by virtue of the statutory 100 days after notice of appeal was given, to approve or disapprove the appellant's exceptions to the trial court's attempted qualification; having failed to approve or disapprove the exceptions filed to the court's qualification timely or otherwise, the defendant's informal bills of exceptions are now conclusively approved by the trial court and no further approval thereof is necessary.

[fol. 105] Art. 760d, V.A.C.C.P. *Time for filing bills of exception.*

". . . If the defendant agrees to the reasons assigned by the trial judge for refusing to approve the bills of exception, he may note such fact on the bills of exception, in which event the bills of exception will stand approved with the reasons of the trial judge as part of and qualification to the bills of exceptions.

"A filing by the defendant of his bills of exceptions with the clerk of the court shall constitute a filing of the bills with the trial court, within the meaning of that term as here used. The clerk of the court will immediately call the trial judge's attention to the filing of the bills of exception.

"Unless the trial court refused to approve the bills of exception within the time above specified, the bills of exception shall be considered as approved by the trial court and no other approval thereof is necessary."

It will be noted that Art. 760d, V.A.C.C.P. has not been complied with in either instances for the reason that the said Art. 760d, is not concerned with informal bills of exceptions but only formal bills of exceptions and it will also be noted that the trial judge did not state his reason or reasons for the refusal to approve the bills of exceptions and return the bills to the clerk of the court who shall note on the bills of exceptions the date and time the

bills were returned to him by the trial judge. The clerk of the court shall immediately notify the defendant that the trial court has qualified the bills of exceptions.

The appellant challenges this Honorable Court to very carefully examine this Statement of Facts, the record and every other exhibit attached to the Statement of Facts or in the record or presented to this Honorable Court in the absence of the defendant or his counsel and if this finding of fact, as indicated by this Honorable Court on [fol. 106] June 20, 1962, can properly be sustained, then the appellant submits that there have been additional exhibits introduced in the appellate court herein wherein the appellant again was not present nor participated in any degree.

This unorthodox proceeding which has been approved by this Honorable Court allows the State to perfect a record in an ex parte proceeding post trial holds that the appellate court will approve such finding, although the record shows the evidence was never adduced during the trial.

This Honorable Court has completely failed to pass on the Federal issues raised by the defendant's exceptions in that he was denied effective assistance of counsel and deprived of confrontation and denied all of his rights guaranteed by the Constitution of the United States as set forth in his exceptions without so much as a mere comment as to whether or not the appellant's position is well taken, thereby indicating that this Honorable Court approves of this procedure as satisfying the requirements of the Fourth, Fifth and Sixth and Fourteenth Amendments of the Constitution of the United States.

This Honorable Court indicated that the appellant had objected to the search and the result thereof for the reason that the search warrant was void. This Honorable Court did not pass on the defendant's bills of exceptions concerning the application of the Federal Constitution as it concerns the search by state officers and in particular the case of *Mapp* v. *Ohio*, 6 Led 2n, 1081, [fol. 107] decided June 19, 1961. The appellant attempted to litigate his Federal Constitutional rights pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments of

the Constitution of the United States in the trial court. Said court did not even give lip service to the substantive constitutional issues involved herein. In this respect this Honorable Court's attention is invited to page 13 of the Statement of Facts wherein the trial court indicated that was only concerned with the cases from the Court of Criminal Appeals of Texas, and after the Honorable Court had read the case of *Mapp* v. *Ohio*, supra, which apparently did not impress him as being a sound decision, he sustained the State's objection to the inquiry on the part of the defense concerning the Federal issues in this cause.

This Honorable Court without so much as one word in the decision delivered on June 20, 1962, completely ignored approximately fifteen pages of objections and exceptions and Federal authorities cited in the Statement of facts. This Honorable Court merely cites two cases from the Court of Criminal Appeals as sustaining the position that the defendant is not allowed the right to a least present evidence concerning his Federal Constitutional rights and have his Federal Constitutional rights protected in a state proceeding.

This Honorable Court likewise by the same procedure ignored the case of *Bolger* v. *Cleary*, 293 Fed 2d. 368, decided August 4. 1961, by the Second Circuit Court of Appeals of the United States. This Honorable Court completely ignored the application of Art. 727a of the [fol. 108] Code of Criminal Procedure of the State of Texas as amended. This Honorable Court is aware that as amended this procedural article prohibits admission of any evidence obtained in violation of the Constitution or laws of the United States and in the instant Opinion there has been no consideration given to the application of this article or of the Federal statutes or case law.

This Honorable Court completely overlooked or ignored the case of *Giordenello* v. *United States*, 2 Led 2d 1503, which is controlling herein, just as the Court below did.

If this Honorable Court remains convinced that the cases cited by the appellant made in the court below from the Supreme Court of the United States and the Circuit Court of the United States should be ignored or

if they are distinguishable, then appellant contends that this Honorable Court should at least distinguish these cases or unequivocally state that they are not controlling in the Court of Criminal Appeals of this State now in order that the appellant may proceed in some other tribunal to have the issues litigated and decided, as it is apparent that there is an obvious conflict in the interpretation of the Fourth, Fifth, and Sixth Amendments of the Constitution of the United States and the statutes implementing these constitutional provisions, to-wit: the Federal Rules of Criminal Procedure and in particular, but not limited to: Rules Nos. 2, 3, 4, 5 and 41. If this Honorable Court refuses to follow the statutes that have been enacted to implement the Federal Constitutional Provisions, the Bar of this State and the citizens of this State are entitled to the Court's position in this respect.

[fol. 109] WHEREFORE, PREMISES CONSIDERED, the Appellant prays this Honorable Court to re-examine the Opinion of the Honorable Judge Belcher delivered on June 20, 1962, and upon said reconsideration and reappraisal of all of the Statement of Facts, Informal Bills of Exceptions, together with the legal authorities cited therein, to reverse and dismiss this cause or in the alternative to reverse and remand this cause to the trial judge with specific directions to the trial judge to give consideration to the Federal Constitution and to afford the appellant to factually present these issues and attending facts to this Honorable Court for their mature consideration.

spectfully submitted,

/s/ Clyde W. Woody
CLYDE W. WOODY
Attorney for Appelant
1114 Texas Avenue Building
Houston 2, Texas
CA-2-9225

[fol. 110]

IN THE COURT OF CRIMINAL APPEALS

Appeal from Harris County

No. 34,681.

NICK ALFORD AGUILLAR, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

OPINION ON MOTION FOR REHEARING—Oct. 31, 1962

Appellant seriously contends that we were in error in considering the offense report which was made a part of the statement of facts by the trial court before he approved the same. During the trial, appellant made no request of the trial court that the offense report be made available to him for the purpose of perfecting his bill of exception. After the conclusion of the trial, the State declined to approve the statement of facts as it was presented to them and moved the court to include the offense report in the statement of facts so that it might be inspected by this Court. Appellant contends in his brief that he was not notified of the filing of or hearing on this motion. Certainly, he should have been given such notice, but we fail to find in this record anything which we are authorized to consider to support the assertion contained in his brief. Be that as it may, it is appellant's position that his two bills were qualified by the trial court *after* the expiration of 100 days following the giving of notice of appeal and contrary to the provisions of Article 760d, V.A.C.C.P. He is mistaken in concluding that Article 760d here controls because he relies upon informal bills of exception and said Article applies to formal bills. His informal bills of exception are controlled by Article 759a; and by the terms of Section 4 of such Act, when the trial court approves a statement of facts after the time set forth in the statute, such ap-

proval shall signify that the time for filing was properly extended.

In the recent opinion of this Court in Hughes v. State, 358 S. W. 2d 386, and the cases there cited, we held that it was error for the trial court to refuse examination of prior written statements made by a witness for the purpose of cross-examination but that the burden is upon appellant to preserve such error and, if so preserved, this [fol. 111] Court will determine whether or not it constitutes grounds for a reversal of the conviction after we have examined the written statement and the testimony of the witness. Since the statements of the two witnesses were made available to this Court, appellant is in no position to complain. To hold otherwise would be tantamount to saying that an accused is entitled to a reversal of his conviction even though it is apparent that he was not injured by the rulings of the trial court.

Appellant questions the soundness of our prior opinion in which we held the affidavit upon which the search warrant was based to be sufficient. He raised in the trial court, and raises here, the question of its sufficiency under the Federal Constitution and, more particularly, the recent holding of the Supreme Court of the United States in Mapp. v. Ohio, 367 U. S. 643, 6 L. ed 2d 1081, 81 S. Ct. 1684. His contention is that the affidavit is insufficient to comply with our State or the Federal Constitution because, after describing the premises sought to be searched, it contained the following recitation:

> " . . . is a place where each *have reason to believe and do believe* that said party so occupying and using, as a private residence, the said building, house and place has in his possession therein narcotic drugs, as that term is defined by law, and contrary to the provisions of law, and for the purpose of the unlawful sale thereof, and where such narcotic drugs are unlawfully sold; *that on or about the 8 day of January, A. D. 1960, Affiants have received reliable information from a credible person and do believe*

that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

His primary contention is that the phrases italicized above are not a sufficient statement of probable cause to comply with the Constitutions of the United States and of this State.

We acknowledge without hesitation our duty to follow the Supreme Court of the United States; Davis v. State, 308 S. W. 2d 880; but we are unable to see how Mapp is here controlling. The search warrant, if there was one, was not before the Court in Mapp.

[fol. 112] The Supreme Court of Ohio in Mapp v. State, 166 N. E. 2d 387, held that evidence obtained by an unlawful search and seizure was admissible in criminal prosecutions. This has not been the rule in Texas since 1925 because in that year the Legislature enacted Article 727a, V.A.C.C.P., and made it clear that the *exclusionary* rule applied in this State.

It would seem, therefore, that if we have properly decided this case under our Constitution and statutes then it has been properly decided under the Constitution of the United States and the holding in Mapp v. Ohio, supra. This Court has often held that an affidavit identical to the one above constitutes a sufficient recitation of "probable cause." Davis v. State, 302 S. W. 2d 419 (1957). We are aware of no decision of the Supreme Court of the United States holding that such an affidavit is insufficient.

We are not unmindful of the decision of the United States Court of Appeals, Fourth Circuit, in Baysden v. U. S., 271 F. 2d 325, where it was held that an affidavit for a warrant was not sufficient under Rule 41(c) of the Federal Rules of Criminal Procedure, 18 U.S.C., unless it stated, in addition to the grounds or probable cause for its issuance, the names of the persons whose affidavits had been taken in support thereof. Our statute (Article 4, V.A.C.C.P.) makes no such specific requirement but does provide that no warrant shall issue without probable

cause supported by oath or affirmation. We are unable to bring ourselves to the conclusion that our *exclusionary* statute and the affidavit before us here deprive an accused of due process under the Federal Constitution.

Remaining convinced that we properly disposed of this cause originally, appellant's motion for rehearing is overruled.

MORRISON, *Judge*

(Delivered October 31, 1962)

[fol. 113]

IN THE COURT OF CRIMINAL APPEALS

* * * *

ORDER DENYING SECOND MOTION FOR REHEARING—
Nov. 28, 1962

Appellant's Second Motion for Rehearing was denied, without written opinion, November 28, 1962.

* * * *

[fol. 114]

IN THE COURT OF CRIMINAL APPEALS

* * * *

CLERK'S CERTIFICATE

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 34,681, styled:

NICK ALFORD AGUILLAR, APPELLANT

vs.

THE STATE OF TEXAS, APPELLEE

judgment of the Criminal District Court of Harris County, was affirmed on June 20, 1962, Appellant's Motion for Rehearing Overruled October 31, 1962, Appellant's Second Motion for Rehearing Overruled, without written opinion, November 28, 1962, and mandate issued on December 7, 1962.

THEREFORE, with the overruling of Appellant's Second Motion for Rehearing, this cause was disposed of by this Court on November 28, 1962, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the Court of last resort of Texas in criminal cases, and said judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas, this 18 day of October 1963.

/s/ Glenn Haynes
GLENN HAYNES, Clerk,
Court of Criminal Appeals of Texas

[fol. 115]

SUPREME COURT OF THE UNITED STATES

No. 39 Misc., October Term, 1963

NICK ALFORD AGUILAR, PETITIONER

vs.

TEXAS

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—October 14, 1963.

On petition for writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 548.

October 14, 1963

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 715955 547

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 548

NICK ALFORD AGUILAR,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

CLYDE W. WOODY
Attorney for Petitioner
1114 Texas Avenue Building
Room 1212
Houston, Texas 77002

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 548

NICK ALFORD AGUILAR,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

Opinions Below

The opinions of the Court of Criminal Appeals of Texas (R. 77; R. 85) are reported at 172 Tex. Crim. 629, 362 S.W.2d 111 (1962).

Jurisdiction

The judgment of the Court of Criminal Appeals of Texas was entered June 20, 1962 (R. 77). A Motion for Rehearing was timely filed on July 3, 1962 (R. 79), and denied October 31, 1962 (R. 85); a Second Motion for Rehearing, timely

filed, was overruled without written opinion on November 28, 1962 (R. 88). The Petition for Writ of Certiorari and Motion for Leave to Appeal *in Forma Pauperis* were filed in this Court on February 25, 1963, docketed as No. 1119 Misc., granted October 14, 1963, and transferred to the appellate docket as No. 548 (R. 90). The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3).

Constitutional and Statutory Provisions Involved

AMENDMENT FOUR, CONSTITUTION OF THE UNITED STATES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT FIVE, CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT FOURTEEN, CONSTITUTION OF THE UNITED STATES

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

62 STAT. 819 (1948); 18 U.S.C. § 3104; RULE 41 (c) FEDERAL RULES OF CRIMINAL PROCEDURE

Search and Seizure: (c) Issuance and Contents.

"*A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied* that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. *It shall state the grounds or probable cause for its issuance* and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the

place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned." (Emphasis added.)

ARTICLE 727 a VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE OF TEXAS

"No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case." As amended Acts 1953, 53rd Leg., p. 669, ch. 253, § 1.

Questions Presented

1. Is a search warrant, which incorporates an affidavit, stating as its recitation of probable cause:

   "... Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purposes of sale and use contrary to the provisions of the law."

   unconstitutional and void as not complying with the Constitution and Statutory provisions concerning probable cause, that is, the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and 18 U.S.C. 3104 (Rule 41 (C) Federal Rules of Criminal Procedure)?

2. Is evidence, obtained as a result of a search of a residence under the authority of a search warrant as described in Question One, admissible in a State which by

Statute requires compliance with the Constitution and Laws of the United States as a condition of admissibility?

3. Have the rights of the Petitioner under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States been violated where evidence, obtained as a result of the execution of a search warrant as described in Question One is admitted into evidence in a State Court as described in Question Two?

Statement

A. Procedural History of the Case

The petitioner was indicted for illegal possession of heroin (R. 1). A trial was had on February 29, 1960, in the Criminal District Court of Harris County, Texas and the petitioner was convicted. On appeal to the Court of Criminal Appeals of Texas the conviction was reversed 170 Tex. Crim. 189, 339 S.W. 2d 898 (1960). Upon a new trial the petitioner was again convicted and sentenced to serve twenty years in the State Penitentiary (R. 4, 7). This cause was again appealed to the Court of Criminal Appeals of Texas (R. 7), which court affirmed the conviction on June 20, 1962 (R. 77), 172 Tex. Crim. 629, 362 S.W. 2d 111 (1962). This affirmance was followed by a Motion for Rehearing (R. 79) which was overruled on October 31, 1962 (R. 85), 172 Tex. Crim. 631, 362 S.W. 2d 112 (1962), and a Second Motion for Rehearing which was overruled on November 28, 1962, without written opinion (R. 88).

B. Facts Material to the Questions Presented

On the 8th day of January, 1960, B. J. Rogers and J. J. Strickland, Houston police officers, swore to an affidavit before W. C. Ragan, a Justice of the Peace for Harris

County, Texas (R. 16-21). The affiants stated as sufficient to establish the existence of probable cause for the issuance of the warrant:

> "... Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law" (Def. Ex. 1; R. 24, 18-A).

Upon this affidavit, Judge Ragan issued a search warrant for the premises of the petitioner (R. 24-25).

In executing the "warrant", officers Rogers and Strickland announced at petitioner's door that they were police officers and that they had a warrant (R. 15). Upon hearing a commotion within the house, the officers burst into the home (R. 17) and seized the petitioner and evidence which was later used against him (R. 27, 33, 46).

C. The Manner in Which Federal Questions Were Raised and Treated in the Trial Court and the Court of Criminal Appeals of Texas

1. *In the Trial Court*

During the trial of this cause in the Criminal District Court of Harris County, Texas, the petitioner, through his attorney, repeatedly objected to the introduction of any and all evidence obtained as a result of the execution of the above mentioned "search warrant" (R. 17, 20, 28, 29, 31, 33, 38, 46). This is the only method in Texas courts for objecting to such evidence; pre-trial motions to suppress are not available. *Bailey* v. *State*, 157 Tex. Crim. 315, 248 S.W. 2d 144, 145 (1952). All of these objections were overruled by the trial judge, exception taken thereto by the petitioner and the evidence admitted (R. 33, 46). These

objections and exceptions were based upon the petitioner's contention that the evidence was inadmissible since it was obtained in violation of the petitioner's rights under the Constitution of the United States, Amendments Four, Five and Fourteen and Federal Rule of Criminal Procedure, 41 (C), 18 U.S.C. § 3104 (R. 21, 28).

2. *In the Court of Criminal Appeals*

In the original opinion for affirmance in this cause issued by the Hon. Judge Belcher on June 20, 1962, which opinion was approved by the Court, it was stated that the affidavit aforementioned did in fact recite sufficient facts and information to constitute probable cause for the issuance of the warrant (R. 78). In the opinion on Motion for Rehearing issued by the Hon. Judge Morrison on October 31, 1962, the Court entered into a more thorough discussion of petitioner's contention that the affidavit in question did not state facts sufficient to constitute probable cause:

> "Appellant questions the soundness of our prior opinion in which we held the affidavit upon which the search warrant was based to be sufficient. He raised in the trial court and raises here the question of its sufficiency under the Federal Constitution and, more particularly the recent holding of the Supreme Court of the United States in Mapp v. Ohio, 367 U.S. 643, 6 L ed 2d 1091; 81 S.Ct. 1684. His contention is that the affidavit is insufficient to comply with our State or Federal Constitution because, after describing the premises sought to be searched, it contained the following recitation:
>
> > '... is a place where each *have reason to believe and do believe* that said party so occupying and using, as a private residence, the said building, house and place has in his possession therein narcotic drugs, as that term is defined by law, and

> contrary to the provisions of law, and for the purpose of the unlawful sale thereof, and where such narcotic drugs are unlawfully sold; *that on or about the 8 day January, A.D. 1960, Affiants have received reliable information from a credible person and do believe* that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.'
>
> His primary contention is that the phrases italicized above are not a sufficient statement of probable cause to comply with the Constitution of the United States and of this State" (R. 86, 87).

The petitioner in the Court of Criminal Appeals consistently and continually contended that the above affidavit did not constitute a sufficient recitation of probable cause and cited to that court this Honorable Court's decisions in the cases of *Giordenello* v. *United States*, 357 U.S. 480 (1958), *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and many other lower federal and state court decisions which unequivocally hold that such a recitation of probable cause is not sufficient to support the issuance of a search warrant (R. 82-84).

The Court of Criminal Appeals of Texas held in its decision of October 31, 1962 (R. 85), that Art. 4, Vernon's Annotated Code of Criminal Procedure of Texas, made no other requirement than that "no warrant shall issue without probable cause supported by oath or affirmation" and that probable cause had been shown in the instant cause (R. 87).

ARGUMENT

I.

This Honorable Court in the case of *Giordenello* v. *United States*, 357 U.S. 480 (1958), had before it a situation arising out of a federal arrest warrant; the affidavit which allegedly supported the requirement of probable cause in *Giordenello* was as follows:

> "The undersigned complainant (Finley) being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code." 357 U.S. 480, 481.

The affidavit upon which the search warrant in the instant case relied for its showing of probable cause and which was approved by the Court of Criminal Appeals is as follows:

> " . . . is a place where each have reason to believe and do believe that said party so occupying and using, as a private residence, the said building, house and place has in his possession therein narcotic drugs, as that term is defined by law, and contrary to the provisions of law, and for the purpose of the unlawful sale thereof, and where such narcotic drugs are unlawfully sold; that on or about the 8th day of January, A.D. 1960, Affiant have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

As has been noted, the Giordenello affidavit pertained to a federal arrest warrant; the affidavit in this case is a part of a state "search warrant". It is the position of petitioner Aguilar that there is no significant distinction. 357 U.S. at 485. The "Search Warrant" in the instant case is in fact an instrument which contains an affidavit, a warrant authorizing a search, and a warrant of arrest, conditioned upon the successful execution of the search warrant; the Affidavit contained in the instrument must suffice for both warrants. Thus, the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and Federal Rules 3, 4 and 41 are brought into interplay in this one instrument denominated a "Search Warrant".

This Court in *Giordenello* stated that:

> "The language of the Fourth Amendment, that ' . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized,' of course applies to arrest as well as search warrants. See Ex parte Burford (U.S.) 3 Cranch 448, 2 L ed 495; McGrain v. Daugherty, 273 U.S. 135, 154-157, 71 L ed 580, 584-586, 47 S. Ct. 319, 50 A.L.R. 1." 357 U.S. at 485.

There is much reference in the *Giordenello* opinion to Rules 3 and 4 of the Federal Rules of Criminal Procedure; these rules "implement" the Fourth Amendment as to arrests. *Ibid.*

Rule 41 of the same Rules is the "implementation" of the Fourth Amendment regarding searches and seizures. In particular, Rule 41 (C) requires that the affidavit must satisfy the requirements of probable cause. These Rules then, 3, 4 and 41, do not afford greater substantive rights to the federally accused than the Constitution itself guarantees to every accused. Rather, the Rules "implement" the

basically worded Constitutional provisions so as to allow them to be applied with some degree of practical certainty. A decision, said to be bottomed on these Federal Rules, is, in fact, bottomed on the Constitutional Provisions which they implement because the Rules require no more than the Constitution guarantees.

The affidavit in the instant case (R. 24) stated one fact and one fact only, as distinguished from conclusions, upon which a *JUDICIAL* determination of probable cause could have been made; that fact was that the affiant had received "information" (R. 25). That the information was "reliable" (R. 25) and that it was from a "credible person" (R. 25), these were conclusions, not subject to *JUDICIAL* scrutiny at any time of the issuance of the warrant. The balance of the affidavit is based on the belief of the affiants. The affidavit then, is one based on information and belief, mere hearsay. There is no need to discuss the constitutionality of an affidavit based on hearsay since the affidavit is void on its face. *Ibid.*

In upholding a search and arrest warrant based upon this affidavit, the Court of Criminal Appeals of Texas has allowed the " . . . officer engaged in the often competitive enterprise of ferreting out crime" to usurp the Constitutional duty of the 'neutral and detached magistrate'." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948), *Giordenello* v. *United States*, 357 U.S. at 486 (1958).

This Court further held that the complaint in *Giordenello* could not "pass muster" because it provided no means by which the Commissioner could determine the existence of probable cause. *Ibid.*

In Texas, this usurpation is doubly burdensome since the Court of Criminal Appeals prohibits the accused from at any time challenging an affidavit such as the one herein to determine the falsity of facts stated, provided the affidavit

is regular on its face. *Johnson* v. *State,* 163 Tex. Crim. 101, 289 S.W.2d 249 (1956); *Hernandez* v. *State,* 158 Tex. Crim. 296, 255 S.W.2d 219, 5 A.L.R. 2d 394, 398 (1953); *Harkey* v. *State,* 142 Tex. Crim. 32, 150 S.W.2d 808 (1941). It is thus apparent that since the highest criminal appellate court of Texas refuses a consideration of other than the patent irregularity of the affidavit, this consideration is all-important to the accused in this and similar cases.

It must here be noted that the words "Search Warrant upheld by Judge Hannay" which appear on the warrant (R. 24) are a pencilled notation (best noted in the original record (p. 18-A) or in Exhibit "A" of the Respondent's Brief in Opposition to Petition for Writ of Certiorari) probably placed upon the instrument while it was being used by the United States Government in its prosecution of the petitioner upon the same transaction as this cause in the State Court. The petitioner was acquitted in the Federal District Court by a jury.

The "Judge Hannay" named in the notation is the Honorable Allen B. Hannay, a Federal District Judge sitting in the Southern District of Texas, Houston Division; the same judge who upheld the sufficiency of the affidavit in *United States* v. *Giordenello,* which was reversed by this Honorable Court in *Giordenello* v. *United States,* 357 U.S. 480 (1958) for the reason that the affidavit therein did *not* state probable cause.

No inference should be drawn from said notation that petitioner has been afforded the Constitutionally secured right of *JUDICIAL SCRUTINY* as regards the issuance of the warrant herein at the time it was issued or at any time in the state trial court.

II.

The Court of Criminal Appeals has so illogically construed *Mapp* v. *Ohio*, 367 U.S. 643 (1961), that it has circuitously concluded in the instant case that since the state legislature in 1925 enacted a statute (Article 727a, Vernon's Annotated Code of Criminal Procedure) which on its face prohibited the introduction into evidence in a State criminal court of evidence obtained in violation of the Constitution or Laws of the United States, any evidence admitted was automatically Constitutionally admissible (R. 87). In the next sentence the Court states that it:

> " . . . has often held that an affidavit identical to the one above (R. 24) constitutes a sufficient recitation of 'probable cause' Davis v. State, 165 Tex. Cr. R. 2, 302 S.W.2d 419 (1957). We are aware of no decision of the Supreme Court of the United States holding that such an affidavit is insufficient" (R. 87).

It is thus apparent that the "Constitutional" views of this Court vary widely from those of the Court of Criminal Appeals of Texas. Indeed, the Court of Criminal Appeals does not even mention *Giordenello* v. *United States*, 357 U.S. 480 (1958), which was repeatedly urged upon it by petitioner. See R. 83.

This Honorable Court has, in many recent and far-reaching opinions clarified the extent to which the Federal Constitutional provisions (here the Fourth and Fifth Amendments) are controlling upon the States through the Fourteenth Amendment. *Bapp* v. *Ohio*, 367 U.S. 643 (1961); *Marcus* v. *Search Warrant of Property*, 367 U.S. 717 (1961); *Ker* v. *California*, —— U.S. ——, 10 L.Ed.2d 726 (1963).

This Court in its monumental decision in *Mapp* stated:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the *same sanction of exclusion* as is used against the Federal Government." 367 U.S. 643, 655 (emphasis added).

In the

> " . . . first case arriving here since our opinion in Mapp which would afford suitable opportunity for further exploration of that holding in the light of intervening experience . . . "

this Court in *Ker* v. *California*, —— U.S. ——, 10 L.Ed. 2d 726, 733 (1963), explained more fully what is meant by "the same sanction of exclusion as is used against the Federal Government." *Mapp* v. *Ohio*, 367 U.S. at 655 (1961). This Court held that while the States could enforce practical rules governing arrests and searches and seizures, those rules must " . . . not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." *Ker* v. *California*, —— U.S. ——, 10 L.Ed.2d 738 (1963).

There is nothing more fundamental (as opposed to that area over which the states may exercise some discretion) than the Fourth Amendment's emphatic command that " . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . "

Essential to the protection of this basic Constitutional right is that the existence or lack of probable cause be determined " . . . by a neutral and detached magistrate instead of being judged by the officer engaged in the often

competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948). This procedure is specified with particularity in Rules 3, 4 and 41 of the Federal Rules of Criminal Procedure but its inclusion in those Rules does not *a fortiori* place its command within the area of "Supervisory Authority" and thus outside the area of state compulsion. Rather it is clear that Rules 3, 4 and 41, as they require the existence of probable cause in a sworn statement, which statement alone is the basis for a neutral determination of the existence or lack of probable cause, are a very basic and fundamental requirement of the Constitution. The very purpose of the affidavit is to provide a Constitutional standard for the issuance of the Warrant. *Giordenello* v. *United States,* 357 U.S. at 485 (1958). Therefore, when the affidavit " . . . does not provide any basis . . . " for a judicial determination of the presence or absence of probable cause, it is clearly a void process. *Ibid.* What the Constitution requires is an independent and neutral determination of the element of probable cause as it is evidenced solely by the affidavit. *Id.; United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1932).

Conclusion

For the reasons heretofore stated and so that justice may be done, petitioner prays that this Honorable Court reverse the judgment of the court below, remand this cause to the Court of Criminal Appeals of Texas, and in so doing, fully explain the extent to which the Fourth and Fifth Amendments are controlling upon the several states through the Fourteenth as regards the use by the States of search warrants.

Respectfully submitted,

CLYDE W. WOODY
1114 Texas Avenue Building
Room 1212
Houston, Texas
CA 2-9225

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

NO. 548

NICK ALFRED AGUILLAR,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE RESPONDENT

FRANK BRISCOE
District Attorney
Harris County, Texas

CARL E. F. DALLY
Assistant District Attorney
Harris County Courthouse and
Jail Building
Houston, Texas 77002

WAGGONER CARR
Attorney General of Texas

GILBERT J. PENA
Assistant Attorney General

Attorneys for Respondent
The State of Texas

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BRIEF FOR THE RESPONDENT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas (R.77; R.85) are reported at 172 Tex. Crim. 629, 362 S.W. 2d 111 (1962).

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered June 20, 1962 (R.77). A Motion for Rehearing was filed on July 3, 1962 (R.79), and denied October 31, 1962 (R.85); a Second Motion for Rehearing was overruled without written opinion on November 28, 1962 (R.88). The Petition for Writ of

Certiorari and Motion for Leave to appeal in forma pauperis were filed in this Court on February 25, 1963, and certiorari was granted October 14, 1963. The Petitioner has invoked the jurisdiction of this Court under Title 28, U.S.C.A., Sec. 1257 (3).

QUESTIONS PRESENTED

The questions presented are:

1. Whether the provisions of the Fourth and Fourteenth Amendments to the Constitution of the United States requiring "probable cause" for the issuance of a search warrant were met (as was judicially determined by a magistrate), where the affidavit supporting the issuance of the warrant read as follows:

> "A certain building, house and place occupied and used as a private residence, located in Harris County, Texas, described as a one story green frame building, located at 509 Pickney Street, in the City of Houston, County of Harris and in the State of Texas and all out buildings and motor vehicles pertinent to the above described premises; and being the building, house or place of Nick Alfred Aguilar a Mexican male and other person or persons unknown to the affiants by name, identity or description, is a place where we each have reason to believe and do believe that said party so occupying and using, as a private residence, the said building, house and place has in his possession therein narcotic drugs, as that term is defined by law, and contrary to the provisions of law, and for the purpose of the unlawful sale thereof, and where such narcotic drugs are unlawfully sold; that on or about the 8th day of January, A.D. 1960, Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above described

premises for the purpose of sale and use contrary to the provisions of the law."

2. Whether all search warrants issued by magistrates in the State of Texas are void unless they conform to the requirements of the Federal Rules of Criminal Procedure?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT FOUR, CONSTITUTION OF THE UNITED STATES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT FIVE, CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT FOURTEEN, CONSTITUTION OF THE UNITED STATES

"Section 1. All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE 1, SECTION 9, TEXAS CONSTITUTION

"The people shall be secure in their person, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

ARTICLE 4, TEXAS CODE OF CRIMINAL PROCEDURE

"The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches. No warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation."

ARTICLE 725b, SECTION 16, VERNON'S PENAL CODE OF THE STATE OF TEXAS

"Whenever any officers or employee of the Department of Public Safety or any peace officer who has the authority to and is charged with the duty of enforcing the provisions of this Act, shall have reason to believe that any person has in his possession any narcotic drugs contrary to the provisions hereof, he may file, or cause to be filed his sworn complaint to such effect before any magis-

trate of the county in which any such narcotic drugs are located, and procure a search warrant and examine the same. The application for the issuance of and execution of any such search warrant hereunder, and all proceedings relative thereto, shall conform as near as may be to the provisions of Title 6 of the Code of Criminal Procedure, except where otherwise provided in this Act."

ARTICLE 727a, VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE OF TEXAS

"No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

62 STAT. 819 (1948); 18 U.S.C., SECTION 3104; RULE 41(c) FEDERAL RULES OF CRIMINAL PROCEDURE

Search and Seizure: (c) Issuance and Contents.

"A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime,

but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

STATEMENT OF THE CASE

The Petitioner was charged by indictment with the offense of unlawfully possessing heroine, a narcotic drug, in violation of Article 725b of the Texas Penal Code (R.1). A jury in Criminal District Court of Harris County, Texas, rejected the Petitioner's plea of not guilty and assessed his penalty at confinement in the State Penitentiary for twenty years (R.4). The conviction was appealed to the Court of Criminal Appeals of Texas, which is the highest court having criminal jurisdiction in the State. The conviction was affirmed on the 20th day of June, 1962 (R. 77). Petitioner's Motion for Rehearing in the Court of Criminal Appeals of Texas was denied on the 31st day of October, 1962, by written opinion (R.85). The Second Motion for Rehearing was denied without written opinion on the 28th day of November, 1962 (R.88). The opinions (R.77 and R.85) are reported in 172 Tex. Crim. 629, 362 S.W. 2d 111.

The City of Houston Narcotics Officers Strickland and Rodgers, in the company of other officers and armed with a search warrant for the premises at 509 Pinckney Street in Houston, Texas, went to the address and knocked on the door (R.14,15). The knock was answered by a voice asking who was there (R.15,17). Strickland replied they were police officers and had a search warrant for that location (R.15,17). The officers heard scuffling inside and someone started to run (R.30,39). The officers then opened the door and saw

the Petitioner running toward the rear of the house (R.31,39). After pursuing the Petitioner through the house to the bathroom, they saw him throw a package into the commode which he attempted to flush (R.31), 40). The Petitioner was pulled away from the commode and the package was retrieved (R.31,40). The package contained six blue cellophane papers in which there was "white powder" (R.32,40). A chemical analysis proved the white power in each paper to be 36.5 grams of 36.5% pure heroine (R.46,47).

The officers who executed the affidavits to secure the search warrant had gained reliable information from a credible person that the Petitioner had in his possession at his residence narcotics (R.20). After receiving this first information, the officers waited for a time before obtaining the search warrant in order to keep the house under surveillance, undoubtedly to verify their information (R.22). Thereafter, they executed the affidavit which stated that:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purposes of sale and use contrary to the provisions of the law."

Based upon these facts and the affidavit the magistrate to whom it was presented made a judicial determination that probable cause existed for the issuance of the search warrant which was utilized by the officers in gaining entrance to the Petitioner's residence.

Respondent denies each and every allegation of fact stated by Petitioner in his brief, except those facts supported by the record and those facts specially admitted by the Respondent.

ARGUMENT

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The same safeguards are contained in The Texas Constitution, Article 1, Sec. 9, which provides:

> "The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

The issuance of search warrants to search for narcotics is authorized by Article 725b, Sec. 16, of Vernon's Ann. Texas Penal Code, and reads in parts as follows:

> "Whenever any officers or employee of the Department of Public Safety or any peace officer who has the authority to and is charged with the duty of enforcing the provisions of this Act, shall have reason to believe that any person has in his possession any narcotic drugs contrary to the provisions hereof, he may file, or cause to be filed his sworn complaint to such effect before any magistrate of the county in which any such narcotic drugs are located, and procure a search warrant and examine the same. The application for the issuance of and execution of any such search warrant hereunder, and all proceedings relative there-

to, shall conform as near as may be to the provisions of Title 6 of the Code of Criminal Procedure, except where otherwise provided in this Act."

The Petitioner here relies primarily upon the case of *Giordenello v. United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 2d 1503. The fundamental premise of the Petitioner seems to be that there is no distinction between the Giordenello case and the case at bar. He insists further that the case of *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, requires that the Court of Criminal Appeals of Texas follow precisely the decision in the Giordenello case regarding the application of the Federal Rules of Criminal Procedure.

It is to be remembered that the prosecution of Giordenello originated in the Federal Court. Necessarily the sufficiency of the warrant for the arrest of Giordenello was tested by Rules 3 and 4 of the Federal Rules of Criminal Procedure. This Honorable Court decided that the complaint was not sufficient, which read as follows:

> "The undersigned complainant (Finley) being duly sworn states that on or about January 26, 1956, at Houston, Texas, in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride with knowledge of the unlawful importation in violation of Section 174, Title 21, United States Code."

This Honorable Court stated:

> "When the complaint in this case is judged with these consideratic ns in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the

affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

In the present case, the arresting officers obtained a search warrant based upon an affidavit reading in part as follows:

". . . Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

In the Giordenello case, there was a mere recitation that Giordenello "did receive, conceal, etc., a narcotic drug" without any allegations regarding the source of the affiant's knowledge and information, if he had any before obtaining the warrant.

In the present case, two affiants swore not only that the Petitioner unlawfully possessed narcotic drugs, but they swore that they *believed* that he had narcotic drugs in his possession for the purpose of sale, and further that they had been informed (and believed the information to be reliable) by a credible person that the Petitioner had unlawfully in his possession narcotic drugs. The affiants were saying that a credible person told them that the Petitioner possessed narcotic drugs in his residence described in the affidavit.

It is quite clear that the affidavits in this case and the Giordenello case are distinguishable. Probable cause was established in the present case as measured by the applicable standards of the Constitution of the United States and the constitutional and statutory provisions of the State of Texas.

The Petitioner has argued that portions of the affidavit in this case were based upon "information and belief, mere hearsay." His answer is that hearsay has been held to be sufficient to establish probable cause. *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327; *Brinegar v. United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; and see *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697.

It is submitted that the requirements of the Fourth and Fourteenth Amendments to the Constitution of the United States have been met. The affidavit states sufficient facts and information to constitute probable cause for the issuance of the search warrant. A Judicial determination that probable cause existed for the issuance of the warrant was made when the magistrate issued the warrant.

Although the Respondent strenuously urges that the affidavit in question need not be measured by the Federal Rules of Criminal Procedure, it is respectfully urged that it does meet those requirements. *United States v. Eisner,* 297 F.2d 595 (6th Circuit 1962); *United States v. Rugendorf,* 316 F.2d 589 (7th Circuit 1963).

It is further submitted that it would appear that the affidavit in the Giordenello case could not "pass muster" in the State courts in the State of Texas.

The Petitioner is critical of the Court of Criminal Appeals of Texas as he says they have ". . . so illogically construed Mapp v. Ohio, 367 U.S. 643."

The Legislature of the State of Texas in 1925 enacted a statute (Article 727a, Vernon's Ann. Code of Criminal Procedure) which requires the exclusion of

all evidence illegally obtained. The courts of the State of Texas have since that time arduously applied the rule excluding evidence obtained by an unlawful search and seizure. This has already been recognized by this Court. See Appendix to the Opinion of the Court in *Elkins v. United States,* 364 U.S. 206, 224, 80 S.Ct. 1437, 4 L.Ed. 2d 1669.

Petitioner futher complains that the Court of Criminal Appeals of Texas did not discuss *Giordenello v. United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 2d 1503, in its opinion in this case. The Court of Criminal Appeals of Texas has on at least two occasions discussed the Giordenello case. *Giacona v. State,* 169 Tex. Crim. 101, 335 S.W. 2d 837; and *Etchieson v. State,* — Tex.Crim. —, 372 S.W. 2d 690. In each of the cases discussed, the Court pointed out the distinction between the affidavit in the Giordenello case and those in legal effect the same as in the present case.

The Respondent does not understand *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L. Ed. 2d 108; and *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726, to hold that Rules 3, 4 and 41 and the Giordenello case are as binding on the States as the constitutional provisions themselves. The Petitioner expresses a contrary understanding in his brief:

> "Thus, the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and Federal Rules 3, 4 and 41 are brought into interplay in this one instrument denominated a 'Search Warrant'." (Petitioner's Brief, p. 10)

It is believed that the Petitioner's position is not sound, as will be demonstrated by quotations from the opinions he professes to rely upon.

This Honorable Court's clear expression appearing

in *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726, was:

> "Preliminary to our examination of the search and seizures involved here, it might be helpful for us to indicate what was not decided in Mapp. First, it must be recognized that the 'principles governing the admissibility of evidence in federal criminal trials have not been restricted * * * to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts * * * this court has * * * formulated rules of evidence to be applied in federal criminal prosecutions.'
>
> ". . . Mapp, however, established no assumption by this Court of supervisory authority over state courts, cf. Cleary v. Bolger, 371 U.S. 392, 401, 83 S.Ct. 385, 390, 9 L.Ed. 2d 390 (1963), and consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. Mapp sounded no death knell for our federalism . . ."
>
> "This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth

Amendment and in opinions of this Court applying that Amendment. . . ."

". . . The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960). Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques."

If the Petitioner's argument is valid as to the application of Rules 3, 4 and 41(c) of the Federal Rules of Criminal Procedure, why should it be limited to the State rules? Why should not all of the Rules of Federal Procedure be binding upon the States? For example, Petitioner correctly states a Motion to Suppress Evidence, as is recognized in federal procedure, is not recognized in the Texas courts. *Bailey v. State*, 157 Tex. Crim. 315, 248 S.W. 2d 144. Would it not be as logical to argue that Rule 41(e) of the Rules of Criminal Procedure should be applied in Texas courts, permitting the accused to move to suppress allegedly illegally obtained evidence before the trial on the merits? Is not the Petitioner urging that *Mapp v. Ohio* did sound the "death knell for our federalism"?

It is respectfully submitted that in light of the "fundamental criteria" laid down by the Fourth and Fourteenth Amendments and the decisions of this Honorable Court, no fundamental right has been denied the Petitioner.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

FRANK BRISCOE
District Attorney
Harris County, Texas

CARL E. F. DALLY
Assistant District Attorney
Harris County Courthouse and
Jail Building
Houston, Texas 77002

WAGGONER CARR
Attorney General of Texas

GILBERT J. PENA
Assistant Attorney General

Attorneys for Respondent
The State of Texas

SERVICE

I, Carl E. F. Dally, Assistant District Attorney, Harris County, Texas, am a member of the Bar of the Supreme Court of the United States, and I have heretofore entered my appearance in the Supreme Court of the United States in the above captioned cause in behalf of the Respondent; I certify that a copy of the foregoing brief has been forwarded by United States Mail, with first class postage prepaid, to Petitioner's Attorney of Record, Mr. Clyde W. Woody, 1114 Texas Avenue Building, Houston, Texas 77002, on this the ---- day of February, 1964.

CARL E. F. DALLY
Assistant District Attorney
Harris County Courthouse and
Jail Building
Houston, Texas 77002